March 2-4 5 6 Judge Davis

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Submitted.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 194.

HARVEY TERRY, APPELLANT,

vs.

THE COMMERCIAL BANK OF ALABAMA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED JUNE 27, 1874

Modify

Jas. Miller

SUPREME COURT OF THE UNITED STATES.

No. 194.

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1 *Order allowing appeal.*

FRIDAY MORNING, *April 24th*, A. D. 1874.

Court met pursuant to adjournment. Present, the honorable William B. Woods, judge presiding.

* * * * * * *
* * * * * * *

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity.

In this cause the complainant, Harvey Terry, appears in open court and prays an appeal to the Supreme Court of the United States from a final decree rendered in said cause on the 11th day of June, A. D. 1872, and other proceedings had in said cause; and it is ordered by the court that the appeal be allowed, and that the complainant, Harvey Terry, give a bond in the sum of five hundred dollars for all costs of this appeal which may be decreed against him by this court or the Supreme Court of the United States, to be approved. And the complainant files his bond in open court, and there being no objection thereto, the same is approved.

2 *Appeal-bond.*

In the United States circuit court for the southern district of Alabama, in equity.

UNITED STATES OF AMERICA,
Southern District of Alabama:

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA.

Know all men by these presents that we, Harvey Terry, of the city of Columbia, in the State of South Carolina, and John J. Wheadon, of the city of Mobile, in the State of Alabama, are held and firmly bound unto the Commercial Bank of Alabama in the sum of five hundred dollars, to be paid to the said Commercial Bank of Alabama, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 25th day of April, 1874.

Whereas the above-named Harvey Terry, on behalf of himself and on behalf of all other creditors in like condition, and parties to the bill in the above-stated cause, has prosecuted an appeal to the Supreme
3 Court of the United States to reverse the decree and to reverse the denial of motion to file petition, &c., rendered by the district court of the United States sitting at Montgomery, in the middle district of Alabama, on the 11th day of June, 1872, which passed said decree, and at a later date denied such motion, said cause having been removed from said middle district to this said southern district of Alabama by act of Congress:

Now, therefore, the condition of this obligation is such that if said Harvey Terry, or others, shall if he or they fail to make

good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HARVEY TERRY. [SEAL.]
JNO. J. WHEADON. [SEAL.]

Approved and filed April 25th, 1874.

N. W. TRIMBLE, *Clerk.*

4 *Appeal.*

In the United States circuit court for the southern district of Alabama, in equity.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA.

To the honorable the Supreme Court of the United States:

The appeal of Harvey Terry, the above-named plaintiff, on behalf of himself, John Hardy, Jacob F. Terry, and all other creditors in like condition, parties to the bill, appellants, respectfully showeth—

That upon the 26th day of October, 1871, the above-named plaintiff filed his bill in the district court of the United States for the middle district of Alabama against the above-named defendant, claiming payment upon twenty thousand dollars of the bank-bills of said Commercial Bank of Alabama, issued and put in circulation as money by said bank, payable to the bearer on demand; that said plaintiff had acquired possession of said bank-bills in the due course of trade for value, and had protested three thousand and ninety-three dollars of said
5 bank-bills for non-payment more than ten days before the filing of his said bill of complaint, for the benefit of himself and all other persons who may make themselves parties to his said bill and contribute to the expenses of said proceedings.

Said bill averred that said Commercial Bank of Alabama was duly created, organized, and operated under and by virtue of a certain statute of the State of Alabama, granting and conferring certain rights and privileges, &c., and imposing certain obligations, duties, and requirements to be performed by said bank and the stockholders thereof. One of the requirements of said statute was, that if at any time the said bank should issue bills to circulate as money and should become indebted and insolvent, then the persons and property of the stockholders should become liable to contribute to pay the debts of said bank, and pointed out the mode of a bill in equity as a legal and proper proceeding to put said bank in process of liquidation, and to assess upon
6 each and every stockholder a pro-rata sum sufficient to pay all its debts.

Said bill also charged said bank to have regularly issued and put in circulation and had outstanding and unpaid at that date its notes amounting to two hundred thousand dollars, and that said bank was insolvent and unable to pay its debts.

The answer of the defendant filed in the cause in reply, on the 9th day of December following, admits the organization of the bank as charged in the bill, the issuing and putting in circulation as money of such bank-notes then outstanding and unpaid to the amount of one hundred and ninety-one thousand & four hundred dollars, and admitting the insolvency of the bank, and admitted the presentation and demand for payment of three thousand and ninety-three dollars of said bank

notes, but denied the legality of the protest, and denied the right to recover the penalty under said protest.

That upon the hearing of said cause, a receiver was appointed
7 by decretal order of December 14th, 1871, to take charge of and administer upon the assets, estate, rights, and effects of said bank, thus and thereby establishing the rights of complainants and others to the payment of their claims; that the same decretal order contained a direction to the master of said court to summons and notify creditors of said bank, by advertisement once a week for eight weeks in one newspaper in the city of Montgomery, to be and appear before him, and present and file their claims with the undersigned clerk of said court on or before the fourth Monday in May next, or thereafter be forever barred; but no direction was given by the court to said master in such decretal order in this cause to inquire into and take an account of the assets, estate, and effects of said bank, nor to inquire into and take an account of any security, trust-fund, or other liability, liable in law to pay the debts of said bank, nor was such account taken in the cause, and was not reported upon by such master in the cause.

8 That in pursuance of said limited notice given by the master, about forty-seven thousand dollars of such bank notes and other claims were presented and filed in said cause, and allowed, and one claim for thirty-three dollars was rejected, as shown by the report of said master.

That said master reported upon and allowed a claim for a deposit of one Thomas K. Ferguson as a valid claim of full dignity, which your appellants claim was error in the cause; that said master reported upon and allowed the claim of John B. Manning and A. H. De Forest and W. S. Mudd, judgment-creditors, and allowed interest thereon, which appellants claim was error in the cause. That said master reported upon the claim of Harvey Terry, and allowed the face value of such bank notes only, without interest and damages legally due, which your appellants claim was error in the cause.

That in pursuance of a decretal order passed on the 31st day of May, 1872, said master received, filed, passed upon, and allowed the claim of Graves & Rhea, solicitors in the cause on behalf of the plaintiff, and not in like condition of plaintiff, nor for any debt due from said
9 Commercial Bank; which allowance your appellants claim was error in the cause, and that sufficient notice to creditors to file their claims was not given.

That in pursuance of the foregoing proceedings alluded to, the following decree was passed and entered on the 11th day of June, 1872, as a final decree in the cause, as follows:

"It is ordered, adjudged, and decreed by the court that the reports of the master be in all things ratified and confirmed.

"It is further ordered, adjudged, and decreed that J. C. Compton, esq., the receiver in this cause, pay over to the persons herein named, out of the cash in his hands as such receiver, the following amounts, viz:

"1st. To the clerk of this court, four hundred and eleven $\frac{18}{100}$ dollars.

"2nd. To E. C. V. Blake, esq., master, the sum of three hundred and thirty dollars.

"3d. To the marshal of this court, the sum of ten dollars.

"4th. To the complainants' solicitors, the sum of thirty-five hundred dollars in full compensation for all services by them rendered or to be rendered by them in this cause.

10 "5th. That the said J. C. Compton retain out of the cash in his hands, as aforesaid, eleven hundred and twenty-three $\frac{78}{100}$ dollars

as compensation for his services as said receiver in receiving and distributing the cash aforesaid.

"It is further ordered, adjudged, and decreed by the court that J. C. Compton, esq., receiver as aforesaid, pay over the balance of the cash in his hands after paying the fees, costs, and expenses of this suit, as hereinbefore mentioned, to the creditors of said Commercial Bank of Alabama whose claims have been allowed by this court, pro rata, according to the amount of such claim as allowed.

"It is further ordered, adjudged, and decreed by the court that the said J. C. Compton, esq., receiver as aforesaid, distribute the bonds, bills, notes, and all other assets of said bank, after deducting five per centum thereof for his compensation, pro rata, among the creditors of said Commercial Bank of Alabama whose claims have been allowed by the court, in exact proportion to the value of said assets and the amount of each claim as reported by the master and allowed. It is further ordered, adjudged, and decreed that all creditors of and all holders of the bills or notes issued by said Commercial Bank of Alabama who have not reported their claims and had them allowed by this court be, and they are hereby, forever barred and foreclosed from prosecuting their claims against said Commercial Bank.

11

"It is further ordered, adjudged, and decreed that the said Commercial Bank, its officers and stockholders, be, and are hereby, forever discharged from any and all liability for or on account of any debt or demand, of whatsoever nature, now or heretofore subsisting against the said bank or the stockholders of the same.

(S'gn'd) "RICHARD BUSTEED, *Judge.*

"Filed June 11th, 1872."

That thereafter, on the 28th day of January, 1873, an order was taken in open court, and filed in the cause, for the receiver to sell nine thousand dollars in the bonds of the city of Selma, which bonds said receiver in the order recited that he was unable to distribute amongst the creditors thereto as heretofore directed. Said order authorized the sale of said bonds at public or private sale by employment of brokers in New York or elsewhere to sell said bonds.

12

That upon the 30th day of January, 1873, motion and petition and proofs were filed in the cause to open, amend, or consider said decree of June 11th, 1872, a decree interlocutory only, and for further proceedings in the cause; which petition, being heard on the 1st day of February, 1873, was denied.

That on the 11th day of February, 1873, leave was granted by the court to file an amended petition and to offer further proofs thereto in the cause, which amended petition was filed in the cause on the 29th day of May, 1873, and the proofs thereto at that time and thereafter filed.

That on the 23rd day of December, 1873, the receiver filed his report, stating his inability to divide up, dispose of, or sell the remaining bonds in his hands, as heretofore directed, and therein giving the name of claimants who had accepted bonds, &c., in settlement of their claims, and the amounts paid to such claimants, and the amount of cash distributed and paid to each of such claimants, and the amount of bonds on hand unsaleable and unsold and not divided up amongst creditors of said Commercial Bank, the amount being about nine thousand dollars of bonds.

13

That on the 23rd day of April, 1874, a final hearing was had on the said petition amended, and proofs, and the prayer of said petition as amended was denied.

Wherefore your appellants appeal from the whole of said decree of said circuit court of the United States, dated June 11th, 1872, and appeal from all error in the cause that may be shown to exist, and do appeal from all decrees, orders, and all parts of all orders and decrees and proceedings in the cause that do not conform to the prayer in the bill of complaint, and that conflict with the laws of justice and the rules of equity, and respectfully prays that the record of said district court containing the decree of said district court of the United States, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause, and the petition and amended petition and evidence thereto in the said cause, may be sent to the Supreme Court of the United States without delay.

And that the said honorable the Supreme Court of the United
14 States will proceed to hear the said cause anew, and that the decree of said district court may be reversed, and all proceedings in said cause may be reversed that do not conform to the prayer in the bill, and that such other decree shall be made in the cause, in conformity to the prayer in the bill and the laws of justice and the rules of equity, as this honorable the Supreme Court may direct.

HARVEY TERRY,

Appellant per se and all others parties to the bill in like condition.

In the circuit court of the United States for the southern district of Alabama, in equity.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA.

SOUTHERN DISTRICT OF ALABAMA, *ss:*

Harvey Terry, being duly sworn, saith that on the 29th day of April, 1874, at Selma, Alabama, he served on the above-named Commercial Bank of Alabama, the appellee, a copy of the appeal and a copy of
15 the citation filed in this cause with the clerk of the circuit court of the United States in and for the southern district of Alabama, by delivering a copy of said citation and a copy of said appeal personally to E. W. Pettus, one of the firm of Pettus & Dawson, solicitors for said Commercial Bank, and by leaving a copy for said appellee in the clerk's office of the circuit court aforesaid.

HARVEY TERRY.

Sworn to and subscribed before me this 1st day of May, A. D. 1874.

HENRY S. SKAATS,
United States Commissioner Southern District Alabama.

16 *Citation.*

By the honorable W. B. Woods, judge of the United States circuit court for the southern district of Alabama.

To the Commercial Bank of Alabama and to its certain attorneys, Pettus & Dawson:

Whereas Harvey Terry, for himself and others, have lately appealed

to the Supreme Court of the United States from a decree lately rendered in the district court of the United States for the middle district of Alabama, and have appealed from the dismissal of a motion made to file petition in the cause in the United States district court for the middle district of Alabama, said cause being removed from the said district court of the middle district of Alabama, by act of Congress, to the said circuit court of the United States for the said southern district of Alabama, such motion of fileing petition being finally heard and denied in the cause wherein Harvey Terry, on behalf of himself and others, was complainant, and you, the Commercial Bank of Alabama, was defendant, and has filed the security required by law: You are therefore hereby cited to appear before the said Supreme Court of the United States, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Mobile, this twenty-seventh day of April, A. D. 1874.

W. B. WOODS,
U. S. Judge.

Filed April 27th, 1874.

N. W. TRIMBLE, *Clerk.*

17 Circuit court of the United States for the southern district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } No. 69.

Harvey Terry, being duly sworn, saith that on the 29th day of April, 1874, at Selma, Alabama, he served on the Commercial Bank of Alabama, the appellee, a copy of the appeal and a copy of the citation filed in this cause with the clerk of the circuit court of the United States in and for the southern district of Alabama, by delivering a copy of said citation and a copy of said appeal personally to E. W. Pettus, one of the firm of Pettus & Dawson, solicitors for said Commercial Bank, and by leaving a copy for said appellee in the clerk's office of the circuit court aforesaid.

HARVEY TERRY.

Subscribed and sworn to before me this 1st day of May, A. D. 1874.

N. W. TRIMBLE,
United States Commissioner Southern Dist. Alabama.

18 *Original bill.*

District court of the United States, middle district of Alabama.

To the honorable Richard Busteed, judge of said court for said middle district, sitting as a court of equity at Montgomery, Alabama:

Humbly complaining, showeth unto your honor, your orator, Harvey Terry, who is a citizen of the city of Columbia and State of South Carolina—

First. That a corporation known and called the Commercial Bank of Alabama was duly organized for banking purposes in the city of Selma, in said State of Alabama, in the year, to wit, 1856, under and by virtue

~~C. Compton, Esq., at his office in the building known as "the~~ of an act of incorporation passed by the legislature of the State of Alabama on the 9th day of February, 1856, entitled "An act to incorporate the Commercial Bank of Alabama;" which said corporation, so organized, complied with all the prerequisites of its charter,
19 and, in conformity to the requirements thereof, went into operation, doing a banking business, to wit, in 1856, and, in the course of its business, issued a large number of notes, signed by its proper officers, to circulate as money, and which, in the ordinary course of trade, went into the hands of various persons in the community as the representative of money.

Second. That your orator is the holder and owner of a large amount of said notes of said Commercial Bank of Alabama, which it caused to be issued and put in circulation as money, to wit, of the amount of twenty thousand dollars of said notes, which came into his hands and ownership in the ordinary course of trade and for a valuable consideration, and he is still the owner and holder bona fide of said amount of
20 said notes. And your orator avers that the notes so held by him are of various denominations, a minute description of which would render this bill too prolix, but he now offers $3,093.00 of the same, wrapped in a package marked "Exhibit A," and prays that they may be made a part of this bill of complaint, and also the balance of said $20,000, in a package marked "Exhibit B," and prayed to be taken as a part of this bill.

Third. Orator further avers that he has presented of said bills or notes a large number, amounting in value to the sum of three thousand and ninety-three dollars, (but of various denominations,) to N. H. R. Dawson, the president of, and to Jordan C. Compton, the acting business agent of said bank, on June, 1871, at their respective offices, which were the usual place or places of business of said bank, if any
21 it had, in the said city of Selma, State of Alabama, and during the usual hours of business, for redemption and payment, and both said Dawson, president as aforesaid, and said Compton, said business agent of said bank, refused to redeem or pay the same, either in gold or silver, or otherwise, and also refused to write across the back of said bills, with the day and date of such writing, the word "protested," and sign the same. Whereupon your orator caused the bills, amounting as aforesaid to $3,093.00, to be protested. Said protests were made more than ten days before the filing of this bill, and said notes are still unpaid, and have so remained for more than ten days after said protests made as aforesaid.

A certificate by the notary of such demand, refusal, and protests is enclosed in the package marked "Exhibit A," but is not hereto
22 attached, as said packet is sealed, but the same will be produced on the trial of this cause, and prayed to be taken as a part hereof.

Fourth. Orator charges and avers that said Commercial Bank has notes, which it issued and put in circulation as money, to a large amount, now outstanding and unpaid, to wit, the sum of two hundred thousand dollars, and he files this bill as well for himself as for all other bona-fide holders and owners of the notes of the said bank, so issued to circulate as money, who may make themselves parties to this bill and contribute to the expenses of this proceeding.

Fifth. Your orator charges that said Commercial Bank is clearly insolvent, and unable to pay all of its outstanding circulation, and
23 he prays that such proceedings may be had in your honor's court, sitting in equity in the city of Montgomery, State of Alabama,

and in said middle district, in which said district and State said Commercial Bank of Alabama is located, as shall compel the settlement of all the debts of said bank, and that your honor will require the production of all the books, papers, accounts, assets, monies, and effects of the said bank, and if, upon an examination of the affairs of said bank, the same shall appear to be, as your orator charges it really is, insolvent, that your honor may so declare it, and require its affairs to be wound up and settled; and that your honor will appoint a receiver to take charge of all the assets of said bank, to the end that its affairs may be closed and settled, and that your honor will make all such
24 orders for the accomplishment of said settlement, safely, properly, and economically, as the case may require, and that ultimately, said bank being found insolvent, and the settlement of its affairs being ordered by your honor, such further proceedings may be had under the orders of your honor as shall result in a full distribution of the assets of said bank, according to the rights of all parties as provided by the twenty-first section of said act of incorporation, hereinbefore referred to.

May it please your honor to grant unto your orator the most gracious writ of subpœna, issuing from and out of your honor's court, siting in equity, directed to and requiring the said Commercial Bank of Alabama, which is located at Selma, in the said State of Ala-
25 bama, to answer this bill of complaint, as by the note hereunder written it is required to answer, and that it stand to, abide by, and perform such orders and decrees as your honor shall make in the premises; and if in anything your orator is mistaken in his remedy, your honor will grant unto him such other, or further, or different relief as the nature of the case may require, and as to equity may seem meet; and as in duty bound he will ever pray, &c.

GRAVES & RHEA, &
WATTS & TROY,
Solr's for Compl't.

NOTE.—The defendant is required to answer each of the paragraphs of the foregoing bill, from one to five inclusive.

GRAVES & RHEA, &
WATTS & TROY,
Solr's for Compl't.

Exhibit A to bill.

THE STATE OF ALABAMA,
Dallas County:

Be it known that I, W. R. Nelson, a notary public duly commissioned and sworn, residing in the city of Selma, State and county aforesaid, on the 3d day (third) of June, eighteen hundred and seventy-one, at the request of Harvey Terry; did present the original package of bank-notes herein enclosed and attached, which bank-notes are of the Commercial Bank of Alabama, Selma, described in substance as follows: one hundred and fifty-four notes of one dollar each, ninety-two notes of two dollars each, fifty-five notes of three dollars each, fifty-four notes of five dollars each, thirty-six notes of ten dollars each, twenty-three notes of twenty dollars each, eighteen notes of fifty dollars each, and six notes of one hundred dollars, making in all three thousand and ninety-three dollars in bank-notes of said The Commercial Bank of Alabama, Selma, which said bank-notes being apparently of the regular issues of said The Commercial Bank of Alabama, Selma, for payment to Jordan C. Compton Esq. at his office in the building known as "The

27 Commercial Bank of Alabama," on the third day of June, A. D. eighteen hundred and seventy-one, between the hours of eleven and twelve o'clock a. m., the same being on a regular business day and during business hours, and said Jordan C. Compton, esq., being, as he informed me, the business agent of said "The Commercial Bank of Alabama, Selma," & there being no cashier of said bank, and he refused, upon demand and request made by me to him, to pay the said notes, and he also refused to write across the back of said notes or bills the word "protested," with his name to the same, and he refused also to waive said requirements as made by me, saying he would not have anything to do with it, and he then offered to purchase the said notes at the price of six cents on the dollar for the same, which price I refused, and I then presented the said notes to N. H. R. Dawson, esq., president of said "The Commercial Bank of Alabama, Selma," and I demanded payment of him, and he refused to pay the same, referring me to Jordan C. Compton, esq., as the agent of the said "The Commercial Bank of Alabama, Selma."

28 Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest as well against the drawer or maker of the said notes as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs and charges, and interest suffered or to be sufferd for want of payment of the said notes.

I have this day left at the business office of said N. H. R. Dawson, esq., president of said "The Commercial Bank of Alabama, Selma," having failed to find him in his office between the hours of 4 and 5 p. m. on said 3d day of June, 1871, a notice of this protest, and have also this day mailed a notice of this protest to said N. H. R. Dawson, esq., president of the Commercial Bank of Alabama, Selma, and have directed the same to him at Selma, Alabama.

In testimony whereof I grant these presents under my signature and the impress of my seal of office at Selma, Ala., on the day and year first above written.

[SEAL.] W. R. NELSON,
Notary Public.

[1-dollar State stamp, cancelled.] [25-cent rev. stamp cancelled.]

29 Protested June 3d, 1871. Amount, $3,093.00. Bank-bills Commercial Bank of Alabama, Selma.

Protest, 1.00; presenting, .50; notices, .50; U. S. rev. stamp, .25; Ala. rev. stamp, 1.00—$3.25.

30 I acknowledge myself security for costs of this cause.

J. M. FALKNER.

Filed in office 26th Oct'r, 1871.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

Summons.

UNITED STATES OF AMERICA:

District court of the United States for the middle district of Alabama, in bankruptcy.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded to summon the Commercial Bank of

Alabama, a corporation organized under the laws of the State of Alabama, who is a citizen of the State of Alabama, to appear on or before Monday, the 6th day of November next, to answer a certain bill in
31 equity, filed in our said court against said Commercial Bank of Alabama and other' by Harvey Terry, who is a citizen of the State of North Carolina, to a copy of which said bill it is entitled on application for the same to the clerk of said court.

Herein fail not, and have you then and there this writ.

SEAL OF DISTRICT COURT OF THE UNITED STATES, MIDDLE DIST. OF ALA.

Witness Hon. Richard Busteed, judge of the court aforesaid, this fourth Monday of May, in the year of our Lord one thousand eight hundred and seventy-one. Issued the 26th day of October, in the year of our Lord one thousand eight hundred and seventy-one.

Attest:

E. C. V. BLAKE,
Clerk U. S. Dist. Court Middle Dist. of Ala.

Each of said respondents is hereby notified to enter an appearance in said suit in the clerk's office on or before the rule day next en-
32 suing, to wit, the 6th day of November, 1871; otherwise the bill may be taken pro confesso.

E. C. V. BLAKE, *Clerk.*

Marshal's return.

Received Oct. 26th, 1871.

R. W. HEALY,
U. S. Marshal.

Executed by serving copy of the within summons on the defendant, N. H. R. Dawson, president Commercial Bank of Alabama, J. C. Compton, business agent, at Selma, Alabama, this the 30th day of Oct., 1871.

R. W. HEALEY,
U. S. Marshal,
By H. COCHRAN,
Deputy.

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

33 *Answer to bill.*

UNITED STATES OF AMERICA:

In the district court of the United States for the middle district of the State of Alabama, in equity.

The answer of the Commercial Bank of Alabama, a body-corporate, to the bill of complaint lately exhibited in the said court by Harvey Terry against this defendant.

SEC. 1. This defendant, saving and reserving all right of exception to the said bill of complaint, says, for answer to the said bill of complaint, that the matters and things stated in the first section of said bill of complaint are true.

SEC. 2. And for answer to the second section of said bill of complaint, this defendant says, on information and belief, that the complain-
34 ant was, at the time this suit commenced, the holder and owner of all notes of this defendant which were filed in this honorable court with the said bill of complaint as exhibits thereto; that complainant became the holder and owner of the said notes of said bank by purchasing the said notes at a nominal price merely, and that the complainant purchased said notes after the said bank became and was insolvent, well knowing that the said bank had then failed and become insolvent; and that without this the complainant is not the bona-fide holder or owner of the said notes of said bank, or of any of them; and that said notes did not come into the hands of the complainant in the ordinary or due course of trade, but were purchased by the complainant for a merely nominal sum, as aforesaid.

35 SEC. 3. This defendant, answering the third section of said bill of complaint, says that the complainant did present a large number of the bills of said bank, of various denominations, to N. H. R. Dawson, the president of said bank, and to J. C. Compton, the agent of said bank, at their respective offices in Selma, in June last, during the usual hours of business, for redemption and payment, and that said J. C. Compton and N. H. R. Dawson did each refuse to redeem or pay the notes so presented by complainant, and refused to write across the back of said notes the word "protested," with the day and date of such writing, and sign the same; and, on information and belief, this defendant admits that the notes of said bank so presented amounted to the sum of three thousand and ninety-three dollars; that William R. Nelson, a notary
36 public in and for Dallas County, did, about the month of June, 1871, present a large number of the bills of the said bank, of various denominations, to said N. H. R. Dawson, president of said bank, for payment, as agent of complainant, and the said Dawson refused to pay the same; and that the said William R. Nelson, notary public as aforesaid, on the same day delivered to said N. H. R. Dawson a notice in writing, which is hereto attached, and marked "Exhibit A," as a part of this answer. But this defendant states, on information and belief and the advice of counsel, that the said notes were not duly protested, nor was any one of the notes of said bank mentioned in the third section of the said bill duly or legally protested. This defendant admits, on information and belief, that the complainant has a certificate of a
37 notary public concerning the protest of bills of said bank; but this defendant states, on information and belief and the advice of counsel, that the said certificate is not in law a due or legal protest, and that none of the bills of said bank held by the complainant even were duly or legally protested. That the notes of the said bank held by the complainant are still unpaid.

SEC. 4. And this defendant, for answer to the fourth section of said bill, says that this defendant issued and put in circulation its bills to the amount of one hundred and ninety-one thousand four hundred and eleven dollars, which have not been paid; but this defendant is informed and believes and states that of the said bills of said bank, which were so issued and put in circulation and not paid, bills to a large
38 amount have been lost and destroyed, and are not now outstanding against this defendant; and that all the bills of said bank, other than the said amount of $191,411.00, have been taken up by said bank and cancelled.

SEC. 5. And for answer to the fifth section of said bill, this defendant says that it is true that this defendant is unable to pay all its out-

standing circulation and is insolvent; that this defendant is located at Selma in the district aforesaid.

And this defendant, having answered the said bill of complaint, has caused its seal to be affixed to this answer, and has caused this answer to be signed by its president, N. H. R. Dawson, for the said Commercial Bank of Alabama. And this defendant prays to be hence dis-
39 charged with its reasonable costs in this behalf expended, and this defendant will ever pray, &c.

{ SEAL OF COMMERCIAL BANK OF ALA., SELMA. } N. H. R. DAWSON, *President for Commercial Bank of Alabama.*

PETTUS & DAWSON,
Solicitors for Def'd't.

Exhibit A.

Please take notice that the following-described notes of the Commercial Bank of Alabama, Selma, viz, one hundred and fifty-four notes of one dollar each, ninety-two notes of two dollars each, fifty-five notes of three dollars each, thirty-six notes of ten dollars each, twenty-three *dollars* of twenty dollars each, eighteen notes of fifty dollars each, six notes of one hundred dollars each, making in all thirty hundred
40 and ninety-three dollars, were this day protested by me for non-payment, (the same having been legally demanded and refused,) and the holder looks to you for payment as maker thereof.

Very respectfully,

W. R. NELSON,
Notary Public.

To the Commercial Bank of Alabama, Selma.
N. H. R. DAWSON,
President, Selma.

Filed Dec. 9th, 1871.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

41 *Consent to appointment of receiver.*

United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } In equity.

In the above-stated cause it is agreed between the parties that Jourdan C. Compton, esq're, of Selma, may be appointed receiver for the Commercial Bank.

We consider him a fit and proper person to act in that capacity.

Montgomery, Ala., Dec. 11, 1871.

PETTUS & DAWSON,
Attys. for Respondent.

GRAVES & RHEA AND
WATTS & TROY,
Sol'rs for Compl't.

Filed Dec. 14, 1871.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

42 *Order of court.*

May term, 1871—May 22nd, 1871.

At a district court of the United States for the middle district of Alabama, begun and holden on the 22nd day of May, in the year of our Lord one thousand eight hundred and *and* seventy-one, at Montgomery, Alabama—

Present, the honorable Richard Busteed, judge of said court, John O. Minnis, esqr., United States district attorney, and Robert W. Healy, United States marshal, by whom the court was duly opened at 12 m.

* * * * * * *

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA.

This cause was submitted at the last term of said court to be heard on bill and answer, and on motion of the complainant for the
43 appointment of a receiver of the estate and assetts of the defendant, and was held up for decree in vacation; and it appearing that the said Commercial Bank of Alabama is insolvent, it is now ordered, adjudged, and decreed that the motion of the complainant *of* a receiver be granted.

And it appearing to the court that Jordan C. Compton, of Selma, in this State, is a fit person to act as receiver in this behalf, and the parties having consented in writing to his appointment in this behalf, it is ordered, adjudged, and decreed that said Jordan C. Compton be, and is hereby, appointed receiver of all the assetts and estate of the said Commercial Bank of Alabama, and before entering upon his duties the said receiver shall execute a bond, with good security, in the sum of ten thousand dollars, payable to and to be approved by the clerk of this
44 court, and conditioned for the faithful discharge of his duties as such receiver.

The said receiver shall proceed to collect the assetts of said defendant with all convenient speed, and for that purpose the said receiver shall have power to sue in his own name as such receiver for the collection of any debts due to said defendant or for any property belonging to said defendant.

And it is further ordered and decreed that all suits now pending in which the said Commercial Bank is plaintiff shall be continued and prosecuted to their termination in the name of said Commercial Bank of Alabama. It is further ordered, adjudged, and decreed that the clerk of this court as master in chancery give notice by publication once a week for eight consecutive weeks in the Advertiser and Mail, a newspaper published in the city of Montgomery, in this State, notifying all
45 the creditors of the Commercial Bank of Alabama, and those holding, the notes or bills of said bank, to present and file their claims, and the bills and notes of said bank held by them, with the clerk of this court before the fourth Monday in May next, or the same will be barred.

And it is further ordered, adjudged, and decreed that all the creditors of the said Commercial Bank of Alabama shall present and file their respective claims against said defendant, duly verified, before the fourth

Monday in May next, with the clerk of this court, and that all claims not so presented and filed shall be forever barred.

And it is further ordered, adjudged, and decreed that said receiver shall have authority to compound and compromise all bad and doubtful bonds, bills, or other claims belonging to said bank, and that said receiver shall report to the next term of this court a full account
46 of the assetts of said bank received by him, and of his actings and doings as such receiver.

And it is further ordered, adjudged, and decreed that all the creditors of said bank be enjoined and restrained from sueing or prosecuting any suit or suits against the said bank, defendant, and from levying upon any of the property or assetts of the said defendant, and that all persons having in their possession or under their control any of the property or assetts of said bank be, and they are hereby, required to deliver such property or assetts to the said receiver.

It is further ordered, adjudged, and decreed that all the creditors of said bank who shall present and file their claims under this decree shall be required to contribute rateably, in proportion to their respective claims, to the payment of the costs and expenses of this suit.

Dated December 14, 1871.

RICHARD BUSTEED,
Judge, &c.

47 Filed December 14th, 1871.

E. C. V. BLAKE, *Clerk.*

Filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

48 *Master's summons.*

UNITED STATES OF AMERICA:

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, DEFENDANT. } In equity.

In pursuance of the authority contained in a decretal order made in the above-entitled cause by the honorable Richard Busteed, judge of said court, at a stated term, held at Montgomery, in said district, on the fourteenth day of December, 1871, I, Elliott C. V. Blake, clerk of said court, as master in equity, do hereby notify and summon all the creditors of the said Commercial Bank of Alabama, and those holding the notes or bills of said bank, to present and file their claims, and
49 the bills and notes of said bank held by them, with the undersigned, clerk of said court, before the fourth Monday in May next, or the same will be barred.

And said above-described and mentioned creditors and persons are further summoned and notified to present and file their respective claims against said defendants, duly verified, before the fourth Monday in May next, with the undersigned, clerk of said court, at my office, corner of

Market and Perry streets, in the city of Montgomery, and that all claims not so presented and filed shall be forever barred.

{SEAL OF DISTRICT COURT OF U. S. FOR MIDDLE DIST. OF ALA.} And hereof you, the said creditors and persons, are not to fail, at your peril.

E. C. V. BLAKE,
Clerk U. S. District Court for the Middle District of Alabama, as Master in Equity.

Dated at Montgomery the 6th day of March, A. D. 1872.

50 MIDDLE DISTRICT OF ALABAMA, *ss:*

I direct the above summons to be published, previous to the return day thereof, for eight consecutive weeks in the Montgomery Advertiser and Mail, a newspaper printed and published in the city of Montgomery.

E. C. V. BLAKE,
Clerk & Master.

March 6, '72, filed.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

51 *Proof of publication.*

UNITED STATES OF AMERICA,
Middle District of Alabama:

In the city and county of Montgomery.

M. Watkins, being duly sworn, saith that he is book-keeper in the office of the Montgomery Daily Advertiser and Mail, a newspaper printed and published in the city and county of Montgomery; that the advertisement hereto annexed has been regularly published in the said Montgomery Daily Advertiser and Mail once a week for ten weeks successively, commencing on the 8th day of March, 1872.

M. WATKINS.

Sworn to and subscribed before me at Montgomery, Alabama, this sixth day of May, 1872.

JOHN F. BAILEY,
U. S Commissioner Middle District of Alabama.

Filed 6th May, 1872, at 12 m.

E. C. V. BLAKE, *Clerk.*

52 Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

Report of J. C. Compton, receiver.

In the district court of the United States for the middle district of *of* Alabama.

HARVEY TERRY, COMPLAINANT,
vs.
THE COMMERCIAL BANK OF ALABAMA, DEFENDANT. } In equity.

To the honorable Richard Busteed, judge of the district court of the United States for the middle district of Alabama:

In pursuance of a decree made and entered in the above-entitled

cause on the fourteenth day of December, A. D. 1871, wherein the undersigned was appointed the receiver of the defendant, he filed his bond as such receiver in the sum, and payable, and approved, and con-
53 ditioned as required by said decree, on the sixth day of March, 1872, and thereupon entered upon the discharge of the duties of the office of such receiver.

He respectfully reports that he has received from N. H. R. Dawson, the president of the Commercial Bank of Alabama, the defendant, the sum of twenty-one thousand one hundred and forty-three $\frac{77}{100}$ dollars, and a number of bills of exchange and promissory notes, a list of which is hereto attached in a schedule marked "Exhibit A." He has also received from said president of said bank a number of bonds of the city of Selma, a list and description of which are hereto attached in a schedule marked "Exhibit B." He has also received the receipt of Messrs. Chilton and Thorington, att'ys in the city of Montgomery, for seventy-six hundred and six dollars of the circulating notes of the Central
54 Bank of Alabama, and also all the books of said bank. He has collected of the coupons of the bonds of the city of Selma, not disputed, and recognized as valid, the sum of thirteen hundred and thirty-two dollars. There are suits pending on several of the claims mentioned in schedule marked "Exhibit A," which are designated in said schedule.

All the notes and bills of exchange and the bonds of the city of Selma mentioned in Exhibits A and B are in the hands of Messrs. Pettus and Dawson, atty's, in Selma, who were conducting the suits mentioned and were negotiating a settlement of the disputed bonds of the city of Selma at the time of my appointment. I have left said claims in their hands for settlement as my agents. All of which is respectfully submitted.

May 29th, 1872.

J. C. COMPTON,
Receiver of Commercial Bank of Alabama.

55 EXHIBIT A.

List of bills receivable and bills discounted, the property of the Commercial Bank of Alabama, turned over to its receiver by N. H. R. Dawson, its president.

Acceptance of Jere. Johnson dated May 21st, 1865, due May 23rd, 1865, for	$2,058 11
Note of Selma and Meridian R. R. Co., due Jan'y 1st, 1866.	$3,500 00
Bill of exchange drawn by Jos. Selden and accepted by Jno. L. Murphy, due May 21, '62, suit on same pending in Dallas Co. Cir. Ct	$792 79
Bills drawn by J. W. Park et al. and accepted by James E. Saunders & Sons, due July 3rd, 1862, two bills each for $1,453.82½,	$2,907 65
Bill drawn by Sam'l M. Hill and accepted by J. W. Olds & Co., due July 18th, 1863, for $4,851.89, judgment obtained in Dallas Cir. Ct. for	$7,591 65
Bill drawn by John J. Ormond and accepted by A. S. Nicholson, due May 23rd, 1864	$266 33

The proceeds of the above note were garnisheed and paid over to a note-holder in Tuskaloosa, Ala.

56 Acceptance of W. T. Minter, due April 10, '65..... $3,474 14
In suit in Dallas county circuit court :

Note of Wm. Kerr, due Oct. 1, '66, bal. due..... $237 71
Note of J. A. Norris, due Aug. 1, '65..... $200 00
Note of E. A. Blunt, dated May 29, '67, due one day after date..... $379 71

57 *List of bonds, the property of the Commercial Bank of Alabama, in the hands of Messrs. Pettus and Dawson, attorneys at Selma, Ala., for receiver of said bank.*

Eight bonds of the city of Selma, dated Jan'y 1st, 1862, payable Jan'y 1, '72, each for $2,000.00, Nos. 20, 21, 22, 23, 24, 25, 26, 27, with 9 coupons attached to each, $80.00..... $16,000 00
Six bonds of same date and kind, each for $1,000.00, Nos. 10, 11, 12, 13, 14, 15, 9 coupons attached to each bond, of $40 ea..... $6,000 00
Twenty bonds of same date and kind, each for $500.00, Nos. 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, nine coupons attached, each for $20.00..... $10,000 00

(Written across the face:) The city of Selma has refused to pay the coupons of these thirty-four bonds.

J. C. COMPTON,
Receiver.

58 Seven bonds of the city of Selma, dated July 2nd, 1860, payable July 2nd, 1870, to Northwestern R. R. Company, each for $1,000.00, Nos. 2, 21, 22, 23, 28, 32, 35..... $7,000 00
With three coupons attached to each bond, for $40.00 each.

J. C. COMPTON,
Receiver of the Commercial Bank of Alabama.

Read and filed May 30th, 1872, in open court, by order of court.
E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.
N. W. TRIMBLE, *Clerk.*

59 *Report of E. C. V. Blake, master.*

In the district court of the United States for the middle district of Alabama, in equity.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, AT SELMA, defendant.

Report of master.

To the honorable Richard Busteed, judge of the district court of the United States for the middle district of Alabama:

In pursuance of a decretal order of reference made and entered in the

above-entitled cause on the fourteenth day of December, 1871, by which among other things it was referred to the undersigned, the master of said court, to take an account of the claims of whatsoever description against said defendant, and to compute the amount due such creditors or claimants, and to report thereon to the court with all convenient speed, I, Elliott C. V. Blake, clerk of said court, as master, to whom the matter was referred, do respectfully report:

That I have caused publication, as directed in said decree, to the creditors of said defendant to be made in the Montgomery Advertiser and Mail for eight successive weeks, the first publication of which being on the eighth day of March, 1872. Proof of such publication is hereto attached, marked "Exhibit A," and made a part of this report.

That thirty-six claims, amounting in the aggregate to forty-three thousand three hundred and twenty-five $\frac{60}{100}$ dollars, have been filed before me in accordance with the terms of said decree, and have been severally allowed by me as such master; a schedule of said claims, showing the name and residence of each creditor, the nature of the claim, and the amount due thereon upon this day, is hereto attached, marked "Exhibit B," and made a part of this report.

That three claims have been filed before me after the day named in the decree aforesaid before which such or any evidences of indebtedness might be filed. Satisfactory proof has been made to me, orally, that, excepting the claim of James H. Burns, of Selma, for thirty-three dollars, each of said last claims was forwarded for file on the 25th day of May instant, and as the last day preceding the day before which such claims might be filed fell on Sunday, I have allowed last said claims excepting as to the claim of James H. Burns. A schedule of said claims, marked "Exhibit C," is hereto attached and made part of this report.

That the total amount of bank-notes, judgments for bank-notes, and certificates allowed is ($45,704.86) forty-five thousand seven hundred and four $\frac{86}{100}$ dollars.

That the total amount of said claims not allowed is thirty-three dollars, ($33.00.)

I herewith bring into court, carefully verified and sealed, the said several claims reported upon.

All of which is respectfully submitted.

E. C. V. BLAKE,
Clerk U. S. District Court for the Middle District Alabama, as Master in Equity.

Dated at Montgomery, Alabama, Tuesday, May 29th, 1872.

Supplemental.

I further report that two hundred and nineteen dollars, ($219.00,) presented by John Hardy, of Selma, after the expiration of the time filed in the decree, under order of court of this date is allowed on affidavit filed therewith.

Dated May 30, 1872.

Master.

EXHIBIT A.

UNITED STATES OF AMERICA,
Middle District of Alabama:

Mike Watkins, being duly sworn, on his oath says that he is book-

keeper of the Montgomery Dailey Advertiser and Mail, a newspaper printed and published in the city and county of Montgomery; that the advertisement hereto annexed has been regularly published in the said Montgomery Daily Advertiser and Mail once a week for ten weeks successively, commencing on the 8th day of March, 1872.

MIKE WATKINS.

Sworn to and subscribed before me at Montgomery, Alabama, this 29th day of May, 1872.

GEO. H. PATRICK,
U. S. Commissioner Middle District Alabama.

64 UNITED STATES OF AMERICA:

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, DEFENDANT. } In equity.

In pursuance of the authority contained in a decretal order made in the above-entitled cause by the honorable Richard Busteed, judge of said court, at a stated term, held at Montgomery, in said district, on the fourteenth day of December, 1871, I, Elliott C. V. Blake, clerk of said court, as master in equity, do hereby notify and summon all the creditors of the said Commercial Bank of Alabama, and those holding the notes or bills of said bank, to present and file their claims, and the bills and notes of said bank held by them, with the undersigned, clerk of said court, before the fourth Monday in May next, or the same will be
65 barred; and said above described and mentioned creditors and persons are further summoned and notified to present and file their respective claims against said defendant, duly verified, before the fourth Monday in May next, with the undersigned, clerk of said court, at my office, corner of Market and Perry streets, in the city of Montgomery, and that all claims not so presented and filed shall be forever barred; and hereof you, the said creditors and persons, are not to fail, at your peril.

E. C. V. BLAKE,
Clerk U. S. District Court for the Middle District of Alabama, as Master in Equity.

Dated at Montgomery the 6th day of March, A. D. 1872.
M'ch 8, d o a w—for dut.

66

EXHIBIT A.

Atty. & No.		Name.	Residence.	Nature claim.	Amount.
	1	I. H. Fitts & Co	Tuskaloosa	Bank-notes	105 00
	2	Hiram R. Edmunds	Montgomery	do	9 00
	3	Brook W. Young	Manack	do	50 00
	4	Irvin D. Houser	Manack	do	109 00
	5	William J. Bibb	Montgomery	do	308 00
M. B. & T.	6	George P. White	Uniontown	do	100 00
J. & N. & B. H. R.	7	John B. Manning	New York	Judgt. cir. ct. Dallas Co.	12, 836 00
		Do	do	Interest thereon	450 60
J. & N. B. H. & R.	8	Thos. K. Ferguson	Selma	Bank-notes	4, 682 00
S. & M. K.	9	N. M. Hyatt	Eufaula	do	12 00
S. & M. K.	10	W. A. Ransom & Co	New York	do	15 00
S. & M. K.	11	John McNab	Eufaula	do	6, 403 00
	12	Adkin M. Mosely	Montg'y Co	do	50 00
	13	R. S. Logan	Wetumpka	do	36 00
	14	The State of Alabama	J. F. Grant, tr	do	292 00
	15	Frank B. Bonifay	Pollard	do	7 00
Garrett.	16	Napoleon B. Jones	Greensboro'	do	80 00
	17	Benj. F. Noble	Montgomery	do	905 00
	18	Samuel W. House	Wetumpka	do	258 00
	19	E. Beebe & Co	Montgomery	do	9 00
	20	W. A. Crocheron	Wetumpka	do	465 00
G. & R.	21	Harvey Terry		do	3, 093 00
	22	Samuel W. House	Wetumpka	do	22 00
	23	George F. Moore	Montgomery	do	79 00
		Carried forward			$30, 375 60
67		Bro't forward			30, 375 60
W. & T.	24	J. C. Bonner		Bank-notes	28 00
	25	W. H. Graves	Montgomery	do	102 00
	26	T. L. Penn, jr	Cusseta	do	10 00
J. & N. B. H. & R.	27	Ed. Ikelheimer & Co	Selma	do	1, 391 00
	28	Ed. G. Fowler	Montgomery	do	159 00
	29	Alex. Woods	Jacksonville	do	7 00
J. & N.	30	Thos. K. Ferguson	Selma	do	3, 967 00
Do.		do	do	Certificate of deposit.	200 00
J. & N.	31	Nathaniel Lane	Marengo Co	Bank-notes	240 00
J. C. C.	32	Jourdan C. Compton	Selma	do	598 00
J. C. C.	33	J. H. Haber	Mississippi	do	739 00
J. C. C.	34	Wm. White & Co	Selma	do	4, 235 00
	35	Wm. T. Hatchett	Montgomery	do	1, 263 00
	36	Jas. J. Robinson	La Fayette	do	20 00
					$43, 325 60

SUPPLEMENTAL.

G. H. P.	40	John Hardy	Selma	Bank-notes	$219 00

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EXHIBIT C.

Atty.	No.	Parties.	Residence.	Nature claim.	Amount.
F. C. R.	37	E. A. Powell	Tuscaloosa	Bank-notes	133 00
	38	Wm. S. Mudd	Selma	Judg't c't c't Dallas Co.	2, 166 79
		do	do	Interest	79 47
J. & N.	39	James H. Burns	Selma	Bank-notes	33 00
					$2, 412 26

Allowed:

Amount Exhibit B	$43, 325 60
Amount Exhibit C	2, 379 26
	45, 704 86
Not allowed:	
Amount Exhibit C	33 00
	$45, 737 86

MEM'DA.—Interest calculated to May 29th, 1872.

Read and filed May 30, '72, in open court.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

69 *Order of court.*

May term, 1872.—25.—May 30th, 1872, (from minutes.)

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA.

On reading and filing the report of Master E. C. V. Blake, esquire, dated May 29th, 1872, upon motion, it is ordered by the court that said report be amended to include the claim of John Hardy for $219.00. Whereupon the amendment was made, and, there being no objection, it is ordered that the said report and amendment be, and the same are hereby, in all things confirmed.

Received and filed May 29th, 1873, at Mobile, Ala.

N. W. TRIMBLE, *Clerk.*

70 *Order.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } In equity.

This cause is submitted for a confirmation of the report of the master of the claims filed and proved against the defendant, the Commercial Bank of Alabama, under the decree rendered in this cause of the last term, and also for a confirmation of the report of J. C. Compton, receiver appointed under said decree of last term, and for the proper decrees and orders on said several reports; and it appearing that no exceptions have been filed to either of said reports, it is ordered that the said reports, and each of them, be, and are hereby, in all things confirmed. It is thereupon further ordered, adjudged, and decreed that all claims of any kind or description against the said The Commercial
71 Bank of Alabama, if any, which have not been filed and proved before the master, and allowed by him in his said report, be, and the same are hereby, forever barred.

It is further ordered that it be referred to E. C. V. Blake, esqr., as master, to ascertain and report the amount of all costs and expenses which have accrued in this cause, including a reasonable fee to complainant's solicitors for their services in filing the bill in this cause and conducting the cause to its termination. The said master will report in the premises without delay, and on confirmation of his report the said receiver will pay said costs and expenses out of the cash assets of said bank in his hands. The receiver will retain from all cash assets in his hands a commission of five per centum on the amount thereof for his compensation and services as such receiver, and will distribute pro rata and pay over to the creditors of said bank whose claims have been allowed the
72 residue of cash assets in his hands as such receiver, and from time to time, as the assets of said bank in his hands are converted

into cash, the said receiver will distribute the same in accordance with this order; but in making any distribution of said assets the receiver will estimate the debts of John C. Manning and William S. Mudd, reported by the master, which are judgments founded on bills issued by said bank, at the amount of the face of said bills which are the foundation of said judgments, and will continue such estimate until all the bill-holders whose claims have been allowed by the master are paid in full the amount of the face of the several bills held by them respectively.

It is further ordered that the receiver sell for cash the bonds of the city of Selma in his hands, amounting to seven thousand dollars, on which the interest has been paid, and that said receiver make
73 such sale publicly or privately as in his judgment may be most conducive to the interests of the creditors of said bank, and that said receiver continue to collect, settle, compromise, and convert into cash the remaining assets and claims due to said bank under the powers conferred upon him by the decree in this cause.

May 31, 1872.

RICHARD BUSTEED,
Judge, &c.

Filed May 31st, 1872.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

74 *Order to shew cause.*

In the district court of the United States, middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } In equity.

In this it is made to appear from the report of J. C. Compton, esqr., receiver, that he holds as assets of said defendant eight bonds of the city of Selma, dated January 1st, 1862, payable January 1st, 1872, each for $2,000.00, Nos. 20, 21, 22, 23, 24, 25, 26, 27, with nine coupons attached to each bond for the sum of eighty dollars each; also, six bonds of same kind and date, each for $1,000.00, Nos. 10, 11, 12, 13, 14, 15, with nine coupons attached to each bond for the sum of forty dollars each; also, twenty bonds of the same date and kind, each for $500.00, Nos. 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49, with nine coupons attached, each for the sum of twenty
75 dollars; and that the city of Selma has refused to pay the coupons of said bonds to said receiver.

It is thereupon ordered and decreed that the corporate authorities of said city of Selma show cause at the next term of this court why the writ of mandamus should not issue to require and compel the said corporate authorities to pay said coupons and bonds to the said receiver, and that a copy of this order be served on the mayor of said city of Selma at least twenty days before the next term of this court.

RICHARD BUSTEED, *Judge.*

MAY 31, 1872.

Filed May 31, '72.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

76 *Order of court.*

District court of the United States for the middle district of Alabama.

HARVEY TERRY, COMPLAINANT,
vs.
THE COMMERCIAL BANK OF SELMA, DEF'D'TS.

Upon the application of Ben. Edwards Grey, it is ordered and decreed that it be referred to E. C. V. Blake, the clerk of this court, to take an account of the amount of the bills or notes of said bank belonging to said Grey and now claimed by him, and report the same for allowance to this court without delay.

June 3rd, 1872.

RICHARD BUSTEED,
Judge, &c.

Filed June 3rd, '72.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

77 *Order of court.*

District court of the United States for the middle district of Alabama.

HARVEY TERRY, COMPLAINANT,
vs.
THE COMMERCIAL BANK OF SELMA.

Upon the application of E. D. Millet and J. S. Terry, who present and file for allowance certain bank-notes by them respectively held against the Commercial Bank of Alabama, it is ordered and adjudged that it be referred to E. C. V. Blake, the clerk and master of this court, to audit said claims, and report without delay the amount to which each of said persons is entitled.

June 4, 1872.

RICHARD BUSTEED,
Judge, &c.

Filed June 4, '72.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

78 *Order of court.*

The district court of the United States for the middle district of Alabama.

HARVEY TERRY, COMPLAINANT,
vs.
THE COMMERCIAL BANK OF SELMA.

Upon reading and filing the report of E. C. V. Blake, the clerk and master of this court, made pursuant to a decretal order of this court,

bearing date the 3rd day of June, 1872, in reference to certain bank-notes of said bank held and filed for allowance by Ben. Edwards Grey, amounting to the sum of six hundred and three dollars, it is ordered, adjudged, and decreed that the said report be, and the same is hereby, confirmed, and that said Grey is entitled, with the other creditors, to an equal pro-rata distribution of the funds of said bank, to be paid by the receiver.

June 4th, 1872.

RICHARD BUSTEED,
Judge, &c.

Filed in open court June 4, 1872.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

79 *Report of master upon costs and fees.*

In the district court of the United States for the middle district of Alabama, in equity.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, DEFENDANT. } Report of master upon fees and costs.

To the honorable Richard Busteed, judge of the district court of the United States for the middle district of Alabama:

In pursuance of a decretal order of reference, made and entered in the above-entitled cause on the thirty-first day of May, A. D. 1872, by which, among other things, it was referred to the undersigned, the master of said court, to "ascertain and report the amount of all costs and expenses which have accrued in this cause, including a reasonable fee to complainant's solicitors for their services in filing the bill in this cause,
80 and conducting the said cause to its termination," I, Elliott C. V. Blake, as master, to whom the matter was referred, do respectfully report:

That I have ascertained and found the amount of three hundred and thirty-two ($332.00) dollars as accruing to Elliott C. V. Blake as master in said cause.

That I have ascertained and found the amount of four hundred and eleven $\frac{18}{100}$ dollars as accruing to the clerk of said court, including the amount of forty dollars ($40.00) paid and expended for publication of notice to bill-holders and other creditors.

That I have ascertained and found the amount of ten dollars ($10.00) as accruing to the marshal of said court.

That the costs and expenses of the receiver are determined in the decree of the court above referred to.

That in the matter of a reasonable fee to complainant's solicitors,
81 I was attended by Daniel S. Troy and William H. Graves, esquires, of counsel for complainant, and by Edmund W. Pettus, of counsel for the defendant, and William M. Brooks, esquire, of counsel for bill-holders and creditors of the defendant. I called before me David Clopton, John A. Elmore, Samuel F. Rice, James W. Lapsley, Edmund W. Pettus, and Abram Martin, esquires, and they, being duly

sworn, stated as their opinions, after the several services rendered in this cause had been stated to them by the respective counsel at whose instance called, in substance—

Mr. Clopton: That he thought and was of the opinion that ten per centum of the recovery would be a reasonable fee for complainant's counsel.

Mr. Elmore: That in the event of a certain recovery of twenty-one thousand dollars and a prospect of recovering more, as in this cause admitted, he would say from three thousand to five thousand dollars, say four thousand dollars, as a reasonable fee.

82 Judge Rice: That he was of the opinion that ten per centum of the amount of recovery was fair, and thought that a moderate fee.

Mr. Lapsley: The facts beingt hat the bill was filed Oct., 1871, and all proceedings without any contested litigation, and the assets being in value about twenty-two thousand dollars cash, and with a prospect of further recovery on bonds of city of Selma about thirty-two thousand dollars, and the cause being determined at the present term, and the counsel for all parties facilitating and assisting in the conduct and speedy determination of the cause, was of opinion that a fair fee to solicitors of complainant would be one thousand dollars out of the fund realized, in addition to fee that may be collected out of client.

Judge Pettus: That he was familiar and acquainted with the proceedings in case; has examined all papers in case, and counsel for

83 defendant and interested for stockholders; was of opinion that from two thousand to two thousand five hundred dollars would be a full compensation for all the services rendered by complainant's solicitors, to be paid out of the fund, provided that they are entitled to be paid out of the fund; that in this estimate he did not include the litigation with the city of Selma on account of bonds, because he was of opinion that no such litigation could legally arise in this suit; that he did not in this estimate include any charge of litigation against the stockholders, not anticipating such litigation, there being in hand sufficient assets nominally to pay all demands proven.

Judge Martin: The facts being that a creditor's bill has been filed, the complainant having notes of the bank to the amount of three thousand five hundred dollars; defendant filing answer confessing allegations; decree at first term, and no contested litigation; defendant's

84 counsel assisting in having the reports and references made, and endeavoring to facilitate progress of cause, and account of receiver being correct as to amount of assets, would say complainant's solicitors should have from one thousand to fifteen hundred dollars, exclusive of what each client pays his solicitor, out of the common fund; and stated further that if bills of this bank were selling at from nine to ten cents in market, and judicial proceedings instituted whereby the bills secured to be paid seventy-five per centum or more, possibly in full, ten per centum of the amount of recovery would be a moderate fee to charge client, and double that amount not unreasonable as against client; and further, that the solicitors who inaugurated and conducted the proceedings should have more than solicitors who presented and proved bills before the master.

I subsequently called before me E. I. Fitzpatrick, Richard M. Williamson, James T. Holtzclaw, and Thomas M. Arrington, esquires,

85 and after the case had been properly stated to them by complainant's counsel, being duly sworn, they stated in substance:

Mr. Fitzpatrick and Mr. Williamson: That they were not personally

familiar with the facts of the suit, but being informed of same by counsel, and upon the fact, as stated to them, as to the character of the suit, thought ten per centum on the amount recovered would be a reasonable and proper fee; the services including professional advice to receiver, and services hereafter to be rendered receiver in recovery and collection of assets; this opinion being based upon the contingent character of the suit, and the degree of professional skill involved in it, and the amount involved.

Mr. Holtzclaw: That complainant's solicitors ought to have ten per centum of the amount realized in cash, and ten per centum on amount to be realized in cash.

86 Judge Arrington: That ten per centum of the recovery would be a reasonable fee for complainant's solicitors; and if the matter had been litigated, would have thought fee should have been larger.

I therefore report that I have ascertained and found, as a reasonable fee to complainant's solicitors for their services in the cause, ten per centum upon the amount recovered and made and now in the hands of the receiver in cash, as by his report on file, to wit, ten per centum upon twenty-one thousand one hundred and forty-three $\frac{77}{100}$ dollars, amounting to two thousand one hundred and fourteen $\frac{37}{100}$ dollars, ($2,114.37,) and that the same is now due and payable to Watts and Troy, and William H. Graves, esquires, solicitors for complainant, out of the fund in court.

And the question of further compensation to complainant's solicitors is reserved by agreement and consent of all parties for the further
87 consideration of the court, as also the question of further costs and expenses of the court if additional services shall be rendered.

All of which is respectfully submitted.

E. C. V. BLAKE,
Clerk, as Master.

Dated Montgomery, Alabama, Tuesday, June 4th, 1872.

Read and filed in open court June 4th, 1872.
E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.
N. W. TRIMBLE, *Clerk.*

88 *First supplemental report of master.*

In the district court of the United States for the middle district of Alabama, in equity.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, AT SELma, defendant.
} First supplemental report of master.

To the honorable Richard Busteed, judge of the district court of the United States for the middle district of Alabama.

In pursuance of a decretal order of reference made and entered in the above-entitled cause on the third day of June, A. D. 1872, by which it was especially referred to the undersigned, the master of said court, "to

take an account of the amount of the bills or notes of said The Commercial Bank belonging to Ben. Edwards Grey, and now claimed by him, and report the same for allowance to this court without delay," I, Elliott C. V. Blake, clerk of said court, as master, to whom the matter was referred, do respectfully report that the amount of the bank-
89 notes of said The Commercial Bank of Alabama held, claimed, and presented by said Ben. Edwards Grey is six hundred and three dollars, ($603,) which said claim, under the order of court before referred to, I have allowed, and now bring into court and file with this report the said bank-notes, together with the affidavit of said Grey as to his ownership of same for value and explaining the causes of delay in presenting them to the master.

All of which is respectfully submitted.

E. C. V. BLAKE,
Clerk of said Court, as Master in Equity.

Dated at Montgomery, Alabama, Tuesday, June 4th, 1872.

Rec'd and filed in open court June 4th, 1872.
E. C. V. BLAKE, *Clerk.*

Rec'd and filed April 13th, 1874.
N. W. TRIMBLE, *Clerk.*

90 *Second supplemental report of master upon claim of E. D. Willett and J. S. Terry.*

In the district court of the United States for the middle district of Alabama. In equity.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, AT SELMA, defendant. } Second supplemental report of master.

To the honorable Richard Busteed, judge of the district court of the United States for the middle district of Alabama:

In pursuance of a decretal order of reference made and entered in the above-entitled cause on the fourth day of June, A. D. 1872, by which it was referred to the undersigned, the master of said court, "to audit said the claims of E. D. Willett and J. T. Terry and report without delay the amount to which each of said persons is entitled," I, Elliott C. V. Blake, clerk of said court, as master, to whom the matter was referred,
91 do respectfully report, that the amount of the bank-notes of said The Commercial Bank of Alabama held, claimed, and presented by said E. D. Willett is three hundred and sixty-two dollars, ($362.00,) and that the amount of said bank-notes of said bank held, claimed, and presented by said J. T. Terry is three hundred and seventy-seven dollars, ($377.00,) making an aggregate of seven hundred and thirty-nine dollars, ($739.00,) which said several claims I have allowed, and now bring into court and file with this report the said bank-notes, together with the affidavit of John A. Walker, agent for said parties, explaining the cause of delay in presenting them to the master; and I further report, that the said claims are entitled to their distribution share pro rata out the fund in court not yet distributed, as if their said claims

had been duly presented and audited, as required by the original
92 decree in the cause and published notice of the master.

All of which is respectfully submitted.

E. C. V. BLAKE,
Clerk, as Master.

JUNE 5TH, 1872.

Read and filed in open court June 6th, 1872.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

93 *Order of court.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity, spring term, 1872.

This cause coming on to be further heard at this term of the court, and having been submitted for final decree upon the pleadings, proof, and reports of receiver and master:

It is ordered, adjudged, and decreed by the court that the reports of the master be in all things ratified and confirmed.

It is further ordered, adjudged, and decreed that J. C. Compton, esqr., the receiver in this cause, pay over to the persons herein named, out of the cash in his hands as such receiver, the following amounts, viz:

1st. To the clerk of this court the sum of four hundred and eleven $\frac{18}{100}$ dollars, $411.18.

94 2nd. To Elliott C. V. Blake, esq're, master, the sum of three hundred and thirty-two dollars, $332.

3rd. To the marshal of this court, the sum of ten dollars, ($10.)

4th. To the complainant's solicitors, the sum of thirty-five hundred dollars, in full of compensation for all services by them rendered or to be rendered in this cause.

5th. That the said J. C. Compton, esq., retain out of the cash in his hands as aforesaid the sum of one thousand one hundred and twenty-three ($1,123.78) dollars as compensation for his services as said receiver in receiving and distributing the cash aforesaid.

It is further ordered, adjudged, and decreed by the court that J. C. Compton, esq., receiver as aforesaid, pay over the balance of the cash in his hands, after paying the fees, costs, and expenses of this suit,
95 as hereinbefore mentioned, to the creditors of said Commercial Bank of Alabama whose claims have been allowed by this court pro rata according to the amount of such claim as allowed.

It is further ordered, adjudged, and decreed by the court that the said J. C. Compton, esq., receiver as aforesaid, distribute the bonds, bills, notes, and all other assets of said bank, after deducting five per centum thereof for his compensation, pro rata amongst the creditors of said Commercial Bank of Alabama whose claims have been allowed by this court, in exact proportion to the value of said assets and the amount of each claim as reported by the master and allowed.

It is further ordered, adjudged, and decreed that so much of the former order of this court as conflicts with this decree be, and the same is hereby, set aside and revoked.

It is further ordered, adjudged, and decreed that all creditors of
96 and holders of the bills or notes issued by said Commercial Bank of Alabama who have not presented their claims and had them allowed by this court be, and they are hereby, forever barred and foreclosed from prosecuting their claims against the said Commercial Bank of Alabama.

It is further ordered, adjudged, and decreed that the said Commercial Bank of Alabama, its officers and stockholders, be, and they are hereby, forever discharged from any and all liability for or on account of any debt or demand, of whatsoever nature, now or heretofore subsisting against the said bank and officers or stockholders of the same.

June 11th, 1872.

RICHARD BUSTEED, *Judge.*

Filed June 11th, 1872.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

97 *Order of substitution.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA.

E. C. V. BLAKE, Esq're,
Clerk of said court:

You will please withdraw our names as solicitors for the complainant in the above-stated cause. As far as we are concerned you can substitute such person as Mr. Terry may desire, but without any liability resting upon us, and the above shall in nowise prejudice any claims for fees which we may have against the said compl't in this cause.

W. H. GRAVES.
WATTS & TROY,
Per GRAVES.

Filed 27 June, A. D. 1872, at 1 p. m.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29, 1873.

N. W. TRIMBLE, *Clerk.*

98 *Exceptions to master's report.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY, PLAINTIFF,
vs.
COMMERCIAL BANK OF ALABAMA, DEFENDANT.
In equity.

Exceptions to the report of Elliott C. V. Blake, esqr., master in the above-entitled cause filed May 30th, 1872, said plaintiff in person, without counsel, and files his exceptions as follows:

1st. Because the master in making up his schedule of claims and the amount thereof neglected to allow interest on the bank-notes of this

claimant, duly protested according to law and entitled to interest thereon, proved in this cause.

2nd. Because the claims of J. B. Manning and W. S. Mudd were allowed upon judgments obtained in the State courts, and interest allowed on said judgments, interests, and costs, and that such claims were not in like condition with the claim of this plaintiff, and ought not to
99 have been allowed in proof in that form, and no interest should be allowed on the judgments of said claims.

3rd. Because the amounts of fees recommended and allowed to the complainant's solicitors in this cause is extremely excessive and oppressive on the complainant and owners, to the other suitors in the cause, and not in accordance with the rules of equity practice, nor sustained by the examinations made by the master.

4th. Because interest was allowed on the judgments of J. B. Manning and W. S. Mudd against the Commercial Bank of Alabama, when, if any interest was allowed, it should have been allowed only upon the bank-notes in proof after protest of notes.

5th. Because interest was allowed by said master to J. B. Manning and W. S. Mudd aforesaid, on their respective judgments and claims, and decreed to be due to them, and no interest was allowed to
100 the complainant in this cause upon his bank-notes duly protested and by law entitled to interest thereon and in proof in this suit, thus giving a preference to and greater benefit of the legal rights and demands of a claimant under the suit than to the plaintiff himself.

HARVEY TERRY,
Plaintiff in the cause.

Filed 28th June, 1872, at 1 p. m.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

101 *Exceptions to decrees Dec. 14th, 1871, and June 11th, 1872.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity.

Exceptions to the decrees of this court dated December 14th, 1871, and June 11th, 1872, in the above-entitled cause, made by Harvey Terry, plaintiff, who appears personally and, without counsel, files the following exceptions thereto:

1st. Because the decree of June 11th, 1872, as a final decree was prematurely taken at the instance and procurement of the solicitors of the defendant and by the consent thereto by other solicitors in the cause.

2nd. Because sufficient notice was not given for all creditors to come forward and prove their claims in said cause, whereby claims larger in amount were excluded from participating in the assets of
102 said bank than the amount of claims proved in this cause, and barred by said decree.

3rd. Because the assets of said bank were not collected in and reduced to cash and made available for distribution before a final distribution was ordered and decreed.

4th. Because the decree of June 11th, 1872, is impracticable and impossible of fulfilment as decreed by the court, inasmuch as the receiver

held a large amount of securities of uncertain value and of different and promiscuous amounts, which securities it was utterly impracticable and impossible to divide and distribute in exact proportion of value and in amounts due to each creditor as directed in said decree.

5th. Because the assets in the hands of the receiver if converted into cash would not pay par to the creditors of the bank, while a large amount of assets and collateral securities pledged and bound by
103 law for the payment of the debts of the bank, to wit, the personal liability of the stockholders for the debts of the bank, and other securities, remains uncollected and unconverted into cash, while many thousands of dollars of the bank-notes and liabilities of said bank remains unproven and unprovided for in this suit in this cause, for want of information of the existence of this suit and of the opportunity to prove said debts in this cause.

6th. Because by the terms of said decrees of December 14th, 1871, and of June 11th, 1872, the creditors of said bank, and this plaintiff in particular, are forever barred from bringing or further prosecuting said claims or any suit against said bank, whereby this complainant is damaged many thousands of dollars by being the owner and holder of the bank-notes of the Commercial Bank of Alabama not included in the proof in this suit, and which now remain in the hands of this
104 plaintiff because he was not advised and did not know that any order of reference had been made or legal notice given in this cause for all persons to come forward and prove their claims.

7th. Because the amount of fees allowed to complainant's solicitors in said cause by decree of June 11th, 1872, is excessive in amount and unjust in principle; and decreed to and paid before the object of said suit is accomplished, that is to say, the collecting all the assets and payment of the debts of the bank.

8th. Because the objects of a bill in chancery have not been accomplished in full in this suit.

HARVEY TERRY,
Plaintiff.

Filed 28th June, 1872, at 1 p. m.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

105 *Exceptions of J. S. Wright to report of master dated May 30, 1872.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, AT Selma, defendant. } In equity.

Exceptions taken by Joseph S. Wright as the transferee of John Hardy et al., who has filed notes, and which claim is allowed to the amount of two hundred and nineteen dollars, to the report of Elliott C. V. Blake, esquire, one of the masters of this court, made in this case, and bearing date the thirtieth day of May, 1872, and filed same day.

FIRST EXCEPTION.—For that the said master has stated in his said report, and in the first schedule or exhibit to which it refers, "Allowed to

John B. Manning and to William S. Mudd various sums of
106 money, amounting together to five hundred and thirty $\frac{07}{100}$ dollars, as interest upon their claims in judgment on bank-notes sued," and this claimant is not allowed interest on his said claim filed.

In all of which particular this claimant doth except to the master's report, and humbly appeals therefrom to this honorable court.

GEO. H. PATRICK,
Solicitor for Joseph S. Wright, Claimant.

Dated at Montgomery, Saturday, June 29th, 1872.

Filed June 29th, 1872, at 3 p. m.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

107 *Additional exceptions of J. S. Wright to report of master of date May 30th, 1872.*

In the district court of the United States for the middle district of Alabama, in equity.

HARVEY TERRY, COMPLAINANT,
against
THE COMMERCIAL BANK OF ALABAMA, AT SELMA, defendant.

Additional exceptions taken by Joseph S. Wright as assignee of John Hardy, who has filed notes, and whose claim has been allowed to the amount of two hundred and nineteen dollars, to the report of Elliott C. V. Blake, esquire, one of the masters of this court, made in this cause and bearing date May 30th, 1872, and filed same day.

SECOND EXCEPTION.—For that the said master has disallowed in his said report the sum of thirty-three dollars to J. H. Burns, a claimant and note-holder, when the receiver in said cause, Jourdan C. Compton,
108 esquire, has collected, and in his hands, and under his control as such receiver more than enough assets to pay all of the bills, notes, and claims against said Commercial Bank of Alabama, defendant, in full, and this claimant has other and more bills of said bank, bought for value before the rendering of said report and the decrees in this cause, and to payment of which he is entitled out of any and surplus fund in said cause.

In all of which particulars this claimant doth except to the master's report, and humbly appeals therefrom to this honorable court.

GEO. H. PATRICK,
Solicitor for Jos. S. Wright, Claimant.

MONTGOMERY, ALA., *June 29th*, 1872.

Filed June 29th, 1872, at 3½ p. m.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

109 *Report of J. C. Compton, receiver.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY, COMPLAINANT,
vs.
THE COMMERCIAL BANK OF ALABAMA, DEFENDANT.

To the honorable Richard Busteed, judge of the district court of the United States for the middle district of Alabama:

In pursuance of a decree made and entered in the above-entitled cause on the day of , 1872, wherein the undersigned, as receiver of the defendant, was directed to divide the assets belonging to the defendant in his hands equally among the creditors of the defendant whose claims had been filed, proved, and allowed in the manner heretofore directed by a decree of your honor in the above-stated case, the undersigned proceeded to execute said decree by making a
110 pro-rata distribution among said creditors according to the respective amounts of their said claims, and has distributed all the money excepting the sum of two hundred dollars, which belongs to creditors who have made no demands upon him, and whose places of residence he has been unable to ascertain, which would have enabled him to have sent the amounts respectively due to each of them. He has also distributed all the bonds belonging to defendant which have come to his hands, excepting bonds of the city of Selma amounting to the sum of nine thousand dollars in bonds of the denominations of one thousand and five hundred dollars each. These bonds he has been unable to distribute for the reason that the amounts due to those creditors who have not received their dividends of bonds are severally small, and he has been unable to effect combinations of these
111 creditors so that each combination might receive one or more bonds in the settlement of their respective claims.

All of which is respectfully submitted.

J. C. COMPTON,
Receiver of the Commercial Bank of Alabama.

Read and filed January 28th, 1873.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

112 *Order to sell bonds.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA.

In this cause J. C. Compton, the receiver heretofore appointed, having filed his report that there remains in his hands of the assets of the defendant nine thousand dollars in bonds of the city of Selma which he has been unable to distribute amongst the creditors entitled thereto—

It is thereupon, on motion of D. S. Troy, esq., a solicitor in the cause, ordered that said receiver sell said bonds of the city of Selma so remaining in his hands for cash, at public or private sale as he may think best; and for this purpose he may employ a broker in New York City or elsewhere, and he will distribute the proceeds of such
113 sale amongst the creditors entitled to said bonds.

Jan'y 28th, 1873.

RICHARD BUSTEED, *Judge.*

Filed in open court Jan'y 28, '73.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

114 *Petition to open decree.*

In the United States district court for the middle district of Alabama, fall term, 1872.

HARVEY TERRY,
vs.
COMMERCIAL BANK OF ALABAMA. } In equity.

A petition by Harvey Terry, the original plaintiff in the above stated cause, who appears in person and, being without counsel, prays this honorable court for its protection and guidance, and for a re-opening and rehearing of its decree in this cause dated June 11, 1872, and for further proceedings in said cause, as this court shall deem meet and proper, for the following reasons and facts below stated:

1st. Because the decree of June 11th, 1872, in this cause was a premature decree, taken by the consent of counsel, both for the plaintiffs and defendant, combining to defeat the objects of this suit, namely,
115 the collection of all of the assets, effects, collaterals, and trust-funds belonging to said bank and liable for its debts, or at least sufficient thereof to pay all of the debts of said corporation, which object and fact has not been nor cannot be obtained under said decree of June 11th; because your petitioner held, and various other creditors of said bank held, at the time of filing said decree, and now hold, many thousands of dollars of the bank-notes of said Commercial Bank not proved before the master in said cause, nor included in the account of debts of said bank in said decree; because your petitioner and other creditors were not informed and did not know that a master had been appointed in this cause to take proof of the debts due by said bank, or that creditors could prove their said claims, as shown by the affi-
116 davits of creditors accompanying this petition, and that sufficient notice was not given to creditors to prove their claims.

2nd. Because said decree, is an impossible decree, in that by its terms it ordered and directed Jordan C. Compton, esq., who is the receiver in said cause, (after deducting certain fees and charges,) to distribute the assets of said bank, consisting of cash, bonds, bills, notes, &c., pro rata and in exact proportion to the value of said assets, to the amount of each claim as reported and allowed. Now, as by the report of said master in the cause, a number of claims are allowed of seven, nine, ten, fifteen, twenty, and fifty dollars each, and various other small amounts; and as the smallest bond in the hands of said receiver is five hundred dollars, this court can readily perceive the impossibility of its receiver

complying with said order, and beyond the fact of making the ex-
117 act amounts required remains the difficulty of affixing the proportionate value of the different classes of securities to be distributed.

3rd. Because said decree is an unjust decree, in that a very limited and insufficient notice of the appointment of a master was published and given to the public to come before said master and prove their claims in this cause against said bank, while many such creditors do exist who hold claims to many thousands of dollars, as shown by the accompanying affidavits, who apply and want to prove such claims in this cause, but who are not only excluded from pro-rata share in this fund in this cause, but barred by the terms of said decree from prosecuting their claims against said bank.

4th. Because the assets in the hands of said receiver in this cause, when reduced to cash, are insufficient to pay par on the claims of
118 your petitioner and other creditors of said bank, and the liabilities of the stockholders to pay the balance of said debts remains uncollected and unappropriated thereto, while said decree discharges the stockholders of said Commercial Bank from all liability to pay to your petitioner or other creditors anything on account of any debt or demand now or heretofore subsisting against them, thereby depriving your petitioner and other creditors of their rights to proceed in this cause to collect many thousands of dollars of assets or trust-funds of said bank, liable to the creditors of said bank for debts due to said creditors at the date of said decree.

5th. Because interest was allowed on the claims of Manning and Deforrest, and W. S. Mudd, as proved in said decree, and interest was not allowed on the claims of your petitioner in said decree, although his bank-notes upon which said claim was founded were duly
119 protested and legally entitled to interest thereon to date of this decree.

6th. Because said decree directed a large amount of money of the fund raised in this cause paid to the solicitors of the complainant, for services in this suit, and which three thousand five hundred dollars, or the pro-rata part thereof, belonged of right to this complainant; said complainant having paid said solicitors a satisfactory retaining-fee and agreed contingent percentage fee upon the amount collected, (which contingent percentage said solicitors insist on claiming,) which contingent percentage your petitioner claims should be remitted by said solicitors or his due pro-rata share of said $3,500 fee should be audited and directed to be paid to your petitioner.

HARVEY TERRY.

Filed in open court 30th January, A. D. 1873.
E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.
N. W. TRIMBLE, *Clerk.*

120 *Order to show cause.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

Upon reading and filing of a petition by Harvey Terry, in the above-

entitled cause, it is ordered that notice be served on the solicitors of the plaintiffs and defendants to show cause why the prayer of the petitioner should not be granted; said order to be returnable to-morrow, or so soon thereafter as said motion can be heard.

Jan'y 30th, 1873.

RICHARD BUSTEED,
Judge, &c.

Filed in open court 30th January, A. D. 1873.
E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.
N. W. TRIMBLE, *Clerk.*

121 *Order allowing amended petition, 29th May, '73.—April term, A. D. 1873.*

Circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

THURSDAY MORNING, *May 29th, A. D.* 1873.

Court met pursuant to adjournment. Present, Hon. Wm. B. Woods, judge presiding.

* * * * * *

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } No. 69. In equity.

In this cause came the complainant in propria persona and prayed the court for leave to amend a petition heretofore presented to the district court for the middle district of Alabama, in the matter of the decree heretofore entered in said cause, which, being heard, it is ordered by the court that the complainant have leave to file such amended petition and affidavits in support thereof, and the further consideration of said matter is continued until the next term of this court.

122 * * * * * *

Order of court, May 29th, '73.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. No. 69.

On motion of Harvey Terry, complainant in the above-stated cause, it is hereby ordered that Jordan C. Compton, esqr., receiver in said cause, is hereby ordered and directed to make return to this court, on the first day of the next term thereof, what amount of moneys remain in his hands from the proceeds of sale of bonds, as directed heretofore to be made by direction of this court, for how much per centum the same were sold, and to what creditors, and the amounts of per centum due on their several claims, belongs.

(S'gn'd) W. B. WOODS, *Judge.*

123 *Report of Receiver Compton, Dec. 23rd, 1873.*

Circuit court of the United States, southern district of Alabama.

HARVEY TERRY, COMPLAINANT,
vs.
COMMERCIAL BANK OF ALABAMA, DEFENDANT.
} In equity. Fall term, 1873.

To the honorable Wm. B. Woods, judge of the circuit court of the United States for the southern district of Alabama:

The report of J. C. Compton, as the receiver of the Commercial Bank of Alabama, the defendant in the above-entitled cause, respectfully showeth unto your honor that, in pursuance to the decrees heretofore made in the cause and to him directed, he has paid out to the creditors of the defendant whose claims were certified to him by the clerk of this court as proper to be paid, the sum of twenty-two thousand and three hundred and twenty-eight $\frac{57}{100}$ dollars, from the cash assets of the defendant which came into his hands, as will appear by schedule hereto attached, marked "Schedule A," and which shows the names of
124 the creditors receiving said money, and the amount received by them respectively. That there remains in his hands, of the cash assets of the defendant, to be distributed, the sum of one hundred and forty-seven $\frac{25}{100}$ dollars, which said sum is now brought into court. That of the bonds of the Northwestern Railroad Company, issued by the city of Selma to said railroad, which came into his hands as assets of the defendant, he has distributed to *to* the creditors aforesaid the sum of forty-eight hundred and sixty-three $\frac{69}{100}$ dollars, as will appear by schedule hereto attached, marked "Schedule B," showing the names of the creditors receiving said bonds and the amounts received by them respectively. That said bonds were at maturity when received by him, and the amount remaining in his hands after the distribution aforesaid he funded with said city, and received other bonds bearing interest for them, which bonds, so received by him, he now brings into court. That of the bonds of the city of Selma issued to the Alabama and Mississippi Railroad Company, and payable in Confederate States
125 currency, which came into his hands as assets of the defendant, he has distributed to the creditors aforesaid the sum of thirty-four thousand five hundred and $\frac{22}{100}$ dollars, as will be shown by schedule hereto attached and prayed to be taken as part of this report. Said schedule is marked "C," and shows the names of the creditors receiving said bonds, and the amount received by them respectively.

That the bonds *be*foresaid remaining in his hands not distributed he compounded with the city of Selma, as he was authorized to do by the previous orders and decrees in this cause, and he now has in his possession of the bonds he received from the said city by said compromise, with the bonds received from said city at the time he funded the past-due bonds of the said Northwestern Railroad Company, the sum of eight thousand six hundred and seventy-eight $\frac{59}{100}$ dollars in bonds of the city of Selma, which he now brings into court.

That in obedience to the previous orders and decrees made in
126 this cause he has endeavored to sell the said bonds now remaining in his hands for distribution, both in Alabama and in New York City, but that owing to the depression in the bond-market since he received said instructions he has been unable to get a purchaser, and that for this reason said bonds remain unsold and the orders of this court of the date of 29th May, 1873, directing him to report at the first day

of this term the amount of money in his hands from the proceeds of the sale of said bonds, and how much per centum they were sold for, and to what creditors, and the amount per centum due on their respective claims, said proceeds belong, cannot now be made to this honorable court.

All of which is respectfully submitted.

(S'gn'd) J. C. COMPTON,
Receiver of the Commercial Bank of Alabama.

127 SCHEDULE A.

No. voucher.	To whom paid.	Amount paid.
1	E. C. V. Blake, clerk	$411 18
2	E. C. V. Blake, master, &c	332 00
3	E. C. V. Blake, for marshal	10 00
4	Watts & Troy and Graves & Rhea, complt. sol	3,500 00
5	J. H. Huber	267 27
6	W. White & Co	1,531 66
7	W. S. Mudd	812 40
8	Harvey Terry	1,118 63
9	John Hardy	79 20
10	E. G. Fowler	54 25
11	W. A. Ransom & Co	5 42
12	N. M. Hyatt	4 34
13	John McNab	2,315 75
14	W. T. Hatchett	456 78
15	W. H. Graves	36 90
16	W. J. Bibb	111 39
17	S. W. House	101 26
18	J. C. Bonner	10 12
19	J. F. Terry	136 35
20	E. D. Willett	131 00
21	E. Beebe & Co	3 25
22	Geo. P. White	36 60
23	J. D. Houser	39 42
24	R. L. Logan	13 02
25	Benj. F. Noble	327 30
26	W. A. Cocheron	168 18
27	Brooks W. Young	18 08
28	James F. Moore	28 60
29	J. C. Compton	216 26
30	John B. Manning	4,808 46
		$17,085 07
128	Amount brought forward	$17,085 07
31	Thos. K. Ferguson	1,693 32
32	State of Alabama	105 60
33	Ed. Ikelheimer	503 08
34	Alex. Woods	2 53
35	Thos. K. Ferguson	1,507 06
36	Nathaniel Lane	86 80
37	Benj. Edwards Grey	218 08
38	H. R. Edwards	3 25
39	J. C. Compton, receiver	1,123 78
		$22,328 57

SCHEDULE B.

1	John B. Manning	
2	State of Alabama	
3	Ed. Ikelheimer	
4	Alex. Woods	4,160 00
5	Thos. K. Ferguson	
6	Nathaniel Lane	
7	Ben. Edwards Grey	
	Paid to Johnston & Nelson, their solicitors.	
8	Benj. F. Noble	500 00
9	Benj. F. Noble	203 69
		$4,863 69

SCHEDULE C.

1	John B. Manning	
2	Thos. K. Ferguson	
3	State of Alabama	
4	Ed. Ikelheimer	
5	Alex. Woods	$23,249 57
6	Thos. K. Ferguson	
129 7	Nathaniel Lane	
8	Ben. Edwards Grey	
	Paid to Johnston & Nelson, their sol.	
9	John McNab	6,000 00
10	William White & Co.	3,991 15
11	J. H. Huber	696 50
12	J. C. Compton	563 00
		$34,500 22

Filed December 23rd, 1873.
(S'gn'd) N. W. TRIMBLE, *Clerk.*

130 *Order of court, Dec. 23rd, 1873.*

December term, A. D. 1873.

Circuit court of the United States for the 5th judicial circuit and southern district of Alabama.

* * * * * * *

TUESDAY MORNING, *December 23rd, A. D.* 1873.

Court met pursuant to adjournment. Present, Hon. William B. Woods, judge presiding.

* * * * * * *

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } No. 69. In equity.

Came J. C. Compton, receiver of the defendant, and read his report of his action as such receiver, which report was filed.

It was ordered by the court that said report be referred to N. W. Trimble, as master, who will audit and state the account of said receiver, and report thereon as soon as practicable.

131 *Master's report on J. C. Compton's report as receiver, &c.*

In the circuit court of the United States for the southern district of Alabama, at Mobile.

HARVEY TERRY, COMPLAINANT
vs.
THE COMMERCIAL BANK OF ALABAMA, DEFENDANT. } Dec. term, 1873.

To the Hon. W. B. Woods, judge of the circuit court of the United States for the fifth judicial circuit:

The undersigned, master in chancery, to whom was referred the report and accounts of J. B. Compton, the receiver in the above-stated cause, reports: That he has executed the reference, and finds that the said report of said receiver is in all respects correct.

That he has examined the account and vouchers of the said receiver, filed in court on the 23d day of December, 1873, and he finds the said account correct, and in every item of credits sustained by the vouchers on file and herewith submitted.

That of the cash assets in his hands, the receiver has paid out, under the former decrees of the court, the sum of ($22,328.57) twenty-two
132 thousand three hundred and twenty-eight $\frac{57}{100}$ dollars, leaving a balance of one hundred and forty-seven $\frac{20}{100}$ dollars, in the hands of the receiver.

That of the bonds issued by the city of Selma to the Northwestern Railroad Company, which were in the hands of the receiver, he has paid out to creditors, in kind, according to the former orders of this court, the sum of four thousand eight hundred and sixty-three $\frac{69}{100}$ dollars.

That of the bonds of the city of Selma, issued to the Alabama & Mississippi Railroad Company, in his hands, as shown by former reports, the receiver has paid out to creditors, under the orders of the court, in kind, the sum of thirty-four thousand five hundred $\frac{22}{100}$ dollars.

The assets now in the hands of the receiver are the one hundred and forty-seven $\frac{20}{100}$ dollars in cash, above stated, and bonds of the city of Selma to the amount of eight thousand six hundred and seventy-eight $\frac{59}{100}$ dollars.

All of which is respectfully submitted.

N. W. TRIMBLE,
Master, &c.

DEC. 27TH, 1873.

133 The master asks that he be allowed the sum of thirty-five dollars for his services in making said examination and executing said reference, and that said receiver be ordered to pay the same out of any funds in his hands as such receiver.

N. W. TRIMBLE,
Master, &c.

Filed December 27th, 1873.

N. W. TRIMBLE,
Clerk.

December term, A. D. 1873. Circuit court of the United States for the 5th judicial circuit and southern district of Alabama.

* * * * * * *

Order of court, Jan. 8th, 1874.

THURSDAY MORNING, *January 8th, A. D.* 1874.

Court met pursuant to adjournment. Present, the Hon. William B. Woods, judge, presiding.

* * * * * * *

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } 69. In equity.

134 On motion of counsel, there being no objections or exceptions thereto, it is ordered by the court that the report of the master, N. W. Trimble, in reference to the report and vouchers filed by J. C. Compton, esq., receiver, &c., on the 23d day of December, A. D. 1873, be, and the same is, in all things confirmed. And it is further ordered that the said master, N. W. Trimble, be allowed the sum of thirty-five dollars for executing the said reference and making said report, and that said receiver, J. C. Compton, pay said sum to said master, out of any funds in his hands as such receiver.

* * * * * * *

Order of court denying motion.

FRIDAY MORNING, *January 23rd, A. D.* 1874.

Court met pursuant to adjournment. Present, Hon. Wm. B. Woods, judge, presiding.

* * * * * * *

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } In equity.

This cause coming on to be heard, on the motion of the com-
135 plainant, Harvey Terry, to set aside the final decree rendered in said cause, and that he be allowed to make further proof of claims before a special master to be appointed by this court, and said motion being argued by counsel and considered by the court, the same is denied; and it is ordered by the court that the said Harvey Terry pay the costs of this motion this day, taxed at five $\frac{50}{100}$ dollars, for which execution may issue.

(S'gn'd) W. B. WOODS, *Judge.*

136 *Affidavit of Harvey Terry.*

In the United States district court for the middle district of Alabama, in equity.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } Fall term, 1872.

Harvey Terry, a citizen of the State of South Carolina, residing at the city of Columbia, being sworn, makes oath, and says that he is the plaintiff in the above-entitled cause, and a creditor of the Commercial Bank of Alabama to a very much larger amount of the bank notes of said bank

yet unproved, held previous to and at the date of the final decree in this cause, June 11th, 1872.

That, although the plaintiff in the cause, he did not personally know of the appointment of a master in said cause, nor of any notice being published, requiring all creditors of said bank to come forward
137 and prove their claims before said master, until after the decree of June 11th, 1872, had been rendered and filed; that the notice published by the master for the space of days in one newspaper in city of Montgomery for 8 weeks, in Alabama alone, was quite insufficient notice to the creditors of a great corporation, having their promises to pay scattered from the city of New York to and beyond the Mississippi River, (say throughout fifteen States,) and there are now existing many creditors of said bank who now want to prove their claims for the notes of said bank in this cause, but are prevented from doing so by the terms of the decree of June 11th, 1872, and not only prevented from making any claim against said bank in this cause, but, by the terms of said decree, all creditors of said bank are thereby barred from ever prosecuting any claim against either the bank or
138 stockholders thereof, while there are yet many thousands of dollars of assets or trust-funds yet uncollected and unappropriated, liable to the creditors of said bank for the payment of their said claims.

That the decree of June 11th was a premature decree, obtained by consent of counsel for the avowed object of shutting out and barring claims of all persons not filed in this cause, while said counsel knew, or had good reason to believe, that many thousands of dollars of the bank notes of said bank remained unfiled in the hands of creditors of said bank, who failed to receive notice given by said master of their right to file said claims, who would have done so, and now wish to do so, as shown by accompanying affidavits.

That said decree of June 11th, 1872, is an impossible decree in that it directs Jordan C. Compton, who is the receiver in said cause, to
139 divide up and make distribution of the assets in said cause in such form and manner that is impossible of execution.

That the assets in the hands of said receiver in this cause, when reduced to cash, are insufficient to pay par on the claims proved of your petitioner and other creditors of said bank, and the liability of the stockholders of said bank to pay the debts of said bank remains uncollected and unappropriated thereto, and said decree discharges the corporation and stockholders of said bank from all liability to pay your petitioner or other creditors anything on account of any debt or demand now or heretofore subsisting against them, thereby depriving your petitioner and other creditors of their right to proceed in this cause to collect par on their claims proved, and to collect many thousands of dollars of assets and trust-funds of said bank liable to the creditors of said bank
140 for debts due to said creditors at the date of said decree.

And that the petition set forth and presented to this court herewith is true.

HARVEY TERRY.

Sworn and subscribed before me this 30th day of January, A. D. 1873.

E. C. V. BLAKE,
Clerk of U. S. Dist. Ct., Mid. Dist. of Ala.

Filed in open court 30th January, A. D. 1873.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

141 *Affidavit of D. S. Troy, in response to petition of Terry.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA.

In answer to the petition filed in said cause by Harvey Terry on the 30th January, 1873, Daniel S. Troy, being duly sworn, deposes and says:

That Watts and Troy, solicitors of said court, were retained by Messrs. Graves and Rhea, to assist them in filing the original bill in said cause, and in conducting the suit to final decree; and the preparation of said bill, and the conduct of the cause on behalf of complainant, devolved on this deponent and W. H. Graves, esq're, of last said firm. Deponent denies that the decree of June 11th, 1872, was premature; it was
142 by consent, in so far as it provided for a distribution of the assets in the hands of the receiver which had not then been converted into cash; but there was no consent of counsel, nor combination of them, to defeat the objects of said suit, namely, the collection of all the assets, effects, collaterals, and trust-funds belonging to said bank and liable for its debts, or sufficient thereof to pay all the debts of said corporation; there was no combination for any such purpose nor to defeat any such objects; the real object of the bill, and the real purpose for which deponent was retained in the case, was to collect the bills of the Commercial Bank held by the complainant, and to collect the assets of the bank for that purpose. To accomplish this purpose, it was necessary to file the bill on behalf of all the creditors of the bank, who would come in and make themselves parties, and share the expenses of the litigation.

143 Deponent believed it to be his duty to press the suit without unnecessary delay, and on coming in of the answer of defendant, the cause was submitted at November term, 1871, for decree, and a decree rendered, appointing a receiver, and ordering a reference to E. C. V. Blake, esq're, as master, to give notice to all creditors who desired to come in, to prove their claims before him, by a day named.

Deponent is informed and believes, and so states, that the notice required by said decree was the usual notice required in such cases, and the same was given by the master, as required by the decree. A number of creditors of the bank proved their claims before said master; said bank had suspended payment several years before the bill was filed, and deponent then believed and still believes, that said notice was
144 sufficient to reach all the creditors of said bank who were reasonably diligent in prosecuting their claims against it, and who were willing to share the risk and expenses of the litigation necessary to their collection. By the terms of said decree, all creditors who failed to prove their claims, and to come in to share the expenses of the litigation as therein provided, were excluded from participation in the results of the litigation.

But after the master's report came in, several creditors of the bank applied to the court, by petition, to be permitted to come in, who had failed to prove their debts before the master. Deponent resisted all of said petitions, and succeeded in defeating some of them. Deponent was informed by W. H. Graves, esq., and upon such information states the fact to be, that all the bills of the said bank, which complainant

had left with him for collection, had been proved before said
145 master and allowed by him; and deponent then had no knowledge, information, or belief that complainant Terry had any other bills of said bank except those proved before and allowed by said master; and if said Terry did then hold or own other bills of said bank, as alleged by him in his said petition, deponent can imagine no reason why he withheld the knowledge of that fact from his solicitors, except a purpose on his part to get them proved and allowed in some indirect way, and thereby avoid paying what he calls "and agreed contingent percentage-fee," the same being, in fact, a fee contingent on the amount recovered. Deponent had no communication with said Terry, verbal or written, prior to the rendition of the final decree in this cause, in reference to this suit, but had heard that he was a speculator in the bills of the broken banks, and that he expected, when he commenced this suit, to buy up other bills against the Commercial Bank and
146 bring them in; and out of abundance of caution, deponent asked W. H. Graves, esq., with whom he was associated in the case, whether said Terry had any other bills of the bank besides those which had been proved and allowed, and was thereupon informed by said Graves that said Terry had no other bills of the bank; that said Terry had told him before the suit was commenced that if he got any other bills of the bank subsequent to that time he would immediately forward them to him; that he had been in correspondence shortly before that time with said Terry, and that said Terry had failed to procure the bills he expected to get when the bill was filed.

The case being ready for a final decree, and it appearing that the assets in the hands of the receiver were equivalent to about 95 per cent., in cash, of the claims proved and allowed, after deducting all expenses, deponent believed that the best interest of his client would
147 be promoted by a final decree in the cause, distributing the assets then in the hands of the receiver; and this opinion was concurred in by all the solicitors who represented creditors of the bank; and said final decree was moved for and obtained by deponent with the sole view and purpose on his part of benefitting the complainant Terry and one or two other creditors for small sums whom deponent represented.

Deponent resisted the allowance of interest on the judgments of Manning and De Forrest and of W. S. Mudd, unless interest was allowed to complainant; but deponent became satisfied that the protest of the bills of the bank held by complainant was insufficient, and that as to damages and interest, he was in the same situation as all other bill-holders; and deponent could see no good reason, and can now see none, why interest should not be allowed on the judgments proved.
148 There was a question as to whether the judgments were not entitled to priority over the other creditors, including said Terry. This, however, was not allowed.

Deponent denies that said Terry is entitled to any part of the fee of thirty-five hundred dollars paid to complainant's solicitors for conducting the litigation. Deponent was informed by W. H. Graves, esq., when he retained deponent to file the bill, that said Terry had paid or agreed to pay one hundred dollars as a retainer, and a sum equal to fifteen per cent. of the cash realized to him by the litigation, and this retainer and contingent-fee said Graves proposed to divide with deponent; but these fees were considered wholly inadequate as compensative for the litigation required, and were not more, in the opinion of affiant and said Graves, than a creditor ought to pay for getting his

claims proved and allowed, after the litigation had proved a suc-
149 cess. And *defendant* is informed, and so states, that it is not more than other creditors did pay to their solicitors in this cause. An allowance out of the general fund for their services in conducting the litigation, if successful, was expected by deponent and by said Graves, at the time deponent was retained, as entirely aside from and independent of the fees paid or agreed to be paid by complainant.

Deponent is informed, and so states, that such an allowance is always made as of course in such litigation, and that complainant has no more right than any other creditor to share in it.

The amount of said allowance in this case was vigorously litigated before the master by the solicitors of several creditors, and a large number of witnesses examined in reference thereto; and the sum thirty-five hundred dollars, finally agreed upon and allowed, is much less, as
150 deponent verily believes, than the master would have been justified in allowing upon the proofs before him and the facts of the case.

D. S. TROY.

Sworn to and subscribed this 1st February, 1873.

J. F. DRESSER,
U. S. Commissioner, Mid. Dist. of Ala.

Filed in open court, Febr'y 1st, 1873.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

151 *Affidavit of J. C. Compton.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } Motion to set aside decree.

Before me, J. F. Dresser, a commissioner of the United States for the middle district of Alabama, personally appeared Jourdan C. Compton, who, being by me duly sworn, doth depose and say that he is the receiver of the defendant in the above-stated case, and that he has received all the assets of the defendant that has come to his knowledge, and has heretofore duly reported the same to the above-stated court; that, as such receiver, and in pursuance of the decree rendered by the said court on the 11th day of June, 1872, affiant, on or about the 3rd July, 1872,
152 paid over to the said Harvey Terry, in person, at Selma, Alabama, an amount of money exceeding the sum of eleven hundred dollars, said sum being his pro-rata dividend of the money of the defendant, which had come into his hands as such receiver; that the said Harvey Terry received said money under and by virtue of said decree, and receipted to affiant, as receiver of the defendant, for the same; that at the time he paid said sum of money under said decree, affiant, as such receiver aforesaid, tendered to the said Harvey Terry his pro rata of the bonds of the city of Selma held by him, as assets of the defendant, and as said bonds tendered by him failed by a small amount (as affiant now

recollect', by less than twenty dollars) of being the exact amount of his pro-rata dividend of said bonds, affiant offered to pay this small balance in money, but the said Harvey Terry refused said proposition and refused to accept said bonds at all or in any event, stating, as his
153 reason for such refusal, that he held notes of said bank which were not allowed in the said decree, and which he desired to have paid; that at the time of the payment of the money aforesaid, the said Harvey Terry had with him a copy of said decree rendered on the 11th June. 1872.

J. C. COMPTON.

Sworn to and subscribed before me this the 31st day of January, A. D. 1873.

J. F. DRESSER,
U. S. Commissioner, Mid. Dist. of Ala.

Filed in open court Febr'y 1st, 1873.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

154 *Affidavit of E. W. Pettus.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF THE STATE OF Alabama.

Edmund W. Pettus and N. H. R. Dawson, partners under the name of Pettus and Dawson, and attorneys and solicitors in the said cause for the defendant, for answer to the petition of the said Harvey Terry, filed in said court on the 30th day of January, 1873, say:

First. That the charge made by said Terry in his said petition, of a combination between the counsel of the plaintiff and the counsel of the defendant in the said suit, to defeat the objects of said suit, is false.

These defendants did not make any combination of any sort with
155 any counsel in said suit to defeat the objects of said suit. And these respondents state, on information and belief, that the purpose and intention of the counsel for said Terry in obtaining the said decree rendered in said suit on the 11th day of June, 1872, were to obtain for their client, the said Terry, as much of the assets of the said bank as they could legally obtain for him.

Second. These respondents, on information and belief, further state that the said Harvey Terry, when said suit was commenced, did not own or have any of the bills or notes of said bank other than the bills which were allowed to him by the said decree in this suit; and that any other bills or notes of the said bank which said Terry may now have or own, were bought by him for a merely nominal sum, (since said suit was commenced,) not exceeding eight per cent. of the nominal value
156 of said bills. And these respondents further state, on information and belief, that it has been the occupation of said Terry, since the year 1865, to buy the bills of broken banks for speculative law-suits,

and that said Terry has become, and is now, a common and general speculator in law-suits of that kind.

Third. And these respondents further state on information and belief that said Harvey Terry, after the said decree of the 11th June, 1872, was rendered, and after he had fully examined and considered said decree, and had full knowledge of said decree, to wit, on or about the 3rd day of July, 1872, did receive from J. C. Compton, receiver in this cause, of the cash assets of said bank, over eleven hundred dollars, (being the full amount of his pro-rata share of said cash assets,) under and by virtue of said decree of the 11th day of June, 1872, and
157 without any other lawful claim or right to receive said sum; and that said Harvey Terry still retains and enjoys said sum of money so received from said receiver, and has never returned said sum or any part thereof.

Wherefore these respondents, on advice and on their information and belief, say that the said Harvey Terry is barred and estopped from denying the validity or equity of the said decree of which he, in his said petition, now complains.

Fourth. These respondents, on information and belief, further state that the said J. C. Compton, the receiver in this cause, tendered to said Harvey Terry, in Selma, in July, 1872, his pro-rata share of the assets of said bank, (other than money,) according to the directions of said decree, and that said decree, as to said Terry, is not and was not impossible of performance, for the said receiver then and there offered to give
158 said Terry the exact value of his pro-rata share of said assets, according to said decree, in said assets and in money to make the exact amount, but said Terry declined to receive his share of said assets.

Fifth. And these respondents further state, on information and belief, that the notice of the order requiring the creditors of said bank to appear and prove their claims against said bank, was published for ten successive weeks in the Advertiser and Mail, a newspaper published in the city of Montgomery, commencing on the 8th day of March, 1872, and requiring said creditors to appear on or before the 4th Monday in May, 1872. The matters stated in this paragraph will fully appear from the record and proceedings in said suit. Affiants further state that, in their opinion, said publication was reasonable notice.

PETTUS & DAWSON.

159 Before me, E. C. V. Blake, clerk of said court, personally comes Edmund W. Pettus, who, being duly sworn, says that the matters and things stated in the foregoing answer of Pettus and Dawson, where stated as of their own knowledge, are true, and where stated as on information and belief, he believes the same to be true.

EDM'D W. PETTUS.

Sworn to and subscribed before me this the first day of February, 1873.

J. F. DRESSER,
U. S. Commissioner.

Filed in open court Febr'y 1st, 1873.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

160 *Answer of W. H. Graves.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA.

In the matter of the petition of Harvey Terry to open the decree of 11th June, 1872, in the cause, &c.

The separate answer of W. H. Graves, the surviving member of the late law-firm of Graves & Rhea to said petition.

This respondent, for answer to so much and such parts of said petition as he is advised it is necessary or material for him to answer unto, answering, saith:

That he denies that the decree in said cause was premature, and alleges that said cause was in every respect ready for said decree.

He admits that said decree was taken by consent of the counsel
161 of complainant and defendants; but the allegation that the same was done by said counsel combining to defeat the object of said suit, to wit, the collection of all the assets of said bank, &c., as by said Terry stated, is utterly false and wholly without foundation.

Respondent does not know what notes petitioner or any other person held at the time of the said decree, which they did not or could not prove on the grounds stated in the petition; but this respondent does not know, and so states the fact to be, that he, nor either of the firm of Graves & Rhea, who were solicitors for complainant in said cause, knew that said Terry had or owned any of the notes of said bank other than those which were already in the hands of said Graves & Rhea, being $3,093.00, and which they filed in this cause, as will appear by the master's report, on file in this hon. court; nor did this respondent,
or either of the said firm of Graves and Rhea, have any idea,
162 intimation, or suspicion that said Terry held or owned any more of said bills; for if respondent or said Graves & Rhea had had any such information, or any reason to believe that said Terry held any more of said notes, they would have most certainly written to him to forward them, so that they could have been properly filed in the cause, for by this course the fees of said Graves & Rhea, and complainant's other solicitors, would have been greatly augmented under the agreement between said Terry and said Graves & Rhea.

Respondent further states that at the time said Graves and Rhea were retained and employed by said Terry in this cause, said Terry informed them (or rather this respondent) that he then had only about $3,000.00 of said bank-notes, but requested said Graves and Rhea to
aver in the bill of complaint, then about to be filed, that he was
163 the owner and holder of $ of said bank-bills, and that he would purchase up all he could before the hearing of the cause; that he knew where he could buy some $12,000.00, or about that sum, and that on leaving this city he would go to this place (respondent thinks it was somewhere in Miss.) and get said notes, but on his return, which was within some two or three weeks, the said Terry informed respondent that he had failed to get said notes, but that he would purchase all he could elsewhere, and forward them to said Graves and Rhea.

Respondent further states that his sole object in getting the decree in

the cause was to promote the interest of said Terry, and he had no other object or interest or motive therefor.

The assets of the bank had been collected by the receiver, and he was about ready to disburse the same, the term of the court was well
164 nigh spent, and respondent could then see no good which could result to his client, the said Terry, in delay; and respondent was of the opinion that said Terry might, and it was there likely that he would, sustain great detriment by not having said decree then rendered, for every additional note which was filed in the cause lessened the pro-rata share of said Terry in the fund to be distributed.

Whether said Terry knew of the appointment of a master in the cause or not, or that creditors could prove their claims, does not know, but the fact is, that respondent wrote frequently to said Terry during the progress of said cause, but cannot recollect exactly the import of all the correspondence, and he has no copies thereof, though the said Terry knew of the appointment of a receiver, and respondent answered every letter promptly which was received from him in relation to said suit. The said Terry has told respondent frequently that he has
165 had great experience in like proceedings against different banks, and in the opinion of respondent he should have known, and any prudent man would have known, that the proper place for such notes was in the hands of his solicitors during the progress of such a cause.

2. In answer to the second paragraph of the petition, respondent is informed and believes that said Terry received his pro-rata share of the money to be distributed from the receiver in the cause, and that his pro-rata share of said bonds was offered to him by the receiver, and about $20.00 in greenbacks to make the amount even, to which said Terry was entitled, and that he refused to accept it.

4. To the 4th paragraph he saith: That the assets of said bank came so near paying par value of its notes (being about 95% cash,
166 after deducting all expenses) that respondent was of the opinion that proceedings against the stockholders would not compensate said Terry for the small balance which he would receive.

5. To the 5th paragraph, he saith:

Respondent shows, by the report on file in the cause, that interest was allowed to said Manning and Deforest and Wm. M. Mudd on their clams, they being judgments against said bank. And the reason why interest was not allowed said Terry on his notes was, that in the opinion of respondent and the other solicitors of complainant, the protest of said notes was illegal and of no effect, and opposition was made to such allowance for this reason.

In answer to the 6th paragraph, respondent saith:

That it is true that the said decree directed a large amount of money of the fund raised in said cause to be paid to respondent and
167 Messrs. Watts and Troy, who were of counsel for complainant in said cause; and respondent here states that the same was allowed by the court after a reference and report of the master, and upon the testimony of a number of the most distinguished members of the Montgomery and Selma bars, as will be seen by inspection of said report, now on file in this hon. court, to which respondent prays reference. In the opinion of respondent, the weight of the testimony clearly established the fact that said solicitors of complainant were entitled to 10% of the amount recovered, as a reasonable fee for their services in the cause, which would have amounted to about $, but by agreement with the solicitors representing nearly all of the notes, respondent, for his firm, and D. S. Troy, esq., for his firm, agreed to receive $3,500.00 cash in full for their

services, which was paid to them by the said receiver. And respond-
168 ent denies that said Terry is entitled to a pro-rata part of said $3,500.00, to be refunded to him, or that any part thereof belongs in any manner to him. 'Tis true said Terry paid to respondent a retaining-fee in said cause, and agreed to pay to respondent's firm certain other fees as hereinafter stated, which was as follows: After considerable conversation, (not necessary here to relate,) respondent agreed to accept $100.00 as a retainer, and to receive as a further fee from said Terry an amount equal to 15% of the amount which he realized from said suit, but by such agreement with said Terry respondent did not intend, nor did he compromise or conclude any right or claim which he might have to such other fee as this hon. court might allow him, and the rules and practice of courts of equity for services by him and his associate counsel performed in a creditor's bill, (as in this cause,)
169 which was for the benefit of all note-holders of said bank. And respondent here now states that he would never have undertaken litigation so difficult in its character, and which was likely to provoke so much opposition as the proceedings in this cause would do, and receive therefor the pittance of only about $550.00, and then divide this sum with Watts and Troy, whom respondent informed said Terry he would associate with his said firm as counsel in said cause, and to which he made no objection. Respondent further states that in a conversation between respondent and D. J. Troy, esq., the fees were spoken of in said cause, and said Troy objected to the terms made by respondent with said Terry, until his attention was directed to the fee which the court would be likely to allow under a creditor's bill, as in this case; he then consented to act as counsel in the cause, and, in the belief
170 of respondent, he would not have otherwise consented.

Respondent avers, and refers to the report of the master on file in this hon. court, to sustain him, that the said fees were very reasonable in amount, and denies the right of said Terry to have any of the same refunded or paid to him.

And now, having fully answered, respondent prays hence to be discharged, &c.

W. H. GRAVES.

Subscribed and sworn to before me this the 1st day of February, 1873.

J. F. DRESSER,
U. S. Commissioner.

Filed in office February 1, 1873.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

171 *Affidavit of Wm. M. Brooks.*

District court of the United States, middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA, at Selma. } In equity.

In response to the petition of Harvey Terry, the complainant, filed in this cause, I make oath and say that my connection with this cause began with my filing the claims of my clients, pursuant to the decree of

this court and the notice thereof published, all which I believe are regular and such as are usual.

The claims of Manning and Mudd which were allowed were in judgments, and that was the reason why interest was allowed thereon. The notes of the bank did not bear interest, and no interest was
172 allowed thereon, for the reason that there was no evidence that the holders thereof had made such demand and caused such protest to be made as entitled them to interest.

The matters of attorneys' fees to complainant's counsel was litigated before the register or master. The contest was conducted, so far as I am concerned, *was conducted* in good faith. Many witnesses were examined, including several of the most eminent members of the bar of this city, and after an investigation for several days, the register reported in favor of allowing the plaintiff's counsel 10 per cent. upon the whole amount of the assets realized, which will more fully and particularly appear by reference to said report. The matter was finally compromised by allowing the attorneys $3,500.00, and the *exceptance* was filed to this report.

The allegations in the petition that the counsel of the plaintiff
173 and defendants had combined together to defeat the object of the suit, is absolutely and, as I believe, corruptly false. If there was any such combination, I was no party to it, and never heard of it. I endeavoured in good faith to promote the interests of my client by a lawful discharge of my duty, and was not actuated by the purpose or any such purpose as in the petition set forth. I had no information or belief at the time the final decree was rendered that complainant had any other notes than those which were by him filed and allowed. I heard he had endeavoured to procure others, but had failed.

At the time the decree was rendered, I believed that it was to the interests of my clients and to the interest of complainant to have the cause then finally disposed of as the decree provides. My clients were willing to take the money and bonds on hand, as the same would
174 amount to nearly enough to pay the entire amount due them, and was content to take the same in full satisfaction, without endeavoring by suit to prosecute their claims against the stockholders, which would be attended with much increased trouble, expense, and delay. The notes had for a long time been selling in the market for about 8 or 9 cents in the dollar, and my clients were well satisfied with the result, and, as I am informed and believe, have long since received their share of the money and bonds. When the settlement was made with the receiver and with my clients, I was not present, and have no personal knowledge of the transaction, the settlement having been made by others.

At the time of the final decree the cause, in my judgment, was ripe for a final hearing, and there was no occasion for further delay;
175 and its disposition of in the manner in the decree provided was well calculated to prevent unnecessary delay and increased costs and expenses. And this respondent prays to be dismissed, &c.

W. M. BROOKS.

Sworn to before me this 1st day of February, 1873, in open court.

RICHARD BUSTEED,
U. S. Dist. Judge, &c.

Filed in open court 1st February, 1873.

E. C. V. BLAKE, *Clerk.*

Filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

176 *Order denying petition, &c.*

In the district court of the United States for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA.

Upon the hearing of the petition filed in this cause by the complainant in person, on January 30th, 1873, and the answers thereunto filed by the attorneys of the respective parties, it is ordered by the court that said petition be denied, and that said Harvey Terry pay all costs thereof, to be taxed by E. C. V. Blake, esq., as master in this cause.

It is further ordered that Jordan C. Compton, esq., receiver in this cause, proceed without delay to execute the decretal order rendered at a former day of this term, and out of the pro-rata share of said Harvey Terry in the proceeds of the bonds in his hands to be sold, said
177 receiver will pay the costs so taxed as aforesaid, against said Terry, unless the same are sooner paid by said Terry in person.

February 1st, 1873.

RICHARD BUSTEED, *Judge.*

Filed February 1st, 1873, in open court.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

178 *Order of court.*

SATURDAY, *February 1st, A. D.* 1873.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } 25. Equity.

This cause coming up for hearing on petition of complainant, appearing for himself, to open decree, &c., affidavits of D. T. Troy, W. H. Graves, E. W. Pettus, Receiver Compton, and Wm. Brooks, are read and filed.

The affidavits of T. P. Branch, Curry, Phinzey, being sworn before a notary public, and not being sufficient acknowledgment, it is ordered by the court that the same be struck from the files; when, on motion of complainant it is ordered by the court that complainant have leave to withdraw same from the files of the court. D. S. Troy, Wm. H. Graves, and Harvey Terry were called, sworn, and examined, whereupon the court delivered its opinion, and ordered: The prayer
179 of the petition is denied, complainant Terry to pay costs, and with costs to affiants, and receiver to proceed under former order, and costs to be paid by receiver out of pro rata in his hands due complainant, to be taxed by E. C. V. Blake as master, &c.

* * * *

180 *Order of court.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1873.

On motion of Harvey Terry, the complainant in the above-stated cause, let cause be shown why so much of the order in this cause dated February 1st, 1873, as denies the prayer of the petitioner, be stayed, and why

that said petitioner should not be allowed to strike out or amend that part of said petition which your petitioner, deems to have been misconstrued as to his intent and meaning either by the court or counsel, and to amend the same and to file his replies thereto in answers made by counsel in rebuttal of such answers, and to such other and further
181 relief as this honorable court may direct; this order to be returnable on Friday morning next, at 10 o'clock, and a copy thereof be served on each of said answering counsel.

February 11th, 1873.

RICHARD BUSTEED,
Judge, &c.

Filed in open court this 11th day of February, 1873.

E. C. V. BLAKE, *Clerk.*

Received and filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

182 *Order of court.*

UNITED STATES OF AMERICA,
Southern District of Alabama:

Spring term, 1873.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity.

On motion of Harvey Terry, complainant in the above-stated cause, it is hereby ordered that Jordan C. Compton, esq., receiver in said cause is hereby ordered and directed to make return to this court on the first day of the next term thereof, what amount of moneys remain in his hands from the proceeds of sale of bonds as directed heretofore to be made by direction of this court, for how much per centum the same were sold, and to what creditors, and the amounts of per centum due on their several claims belongs.

May 29th, 1873.

W. B. WOODS, *Judge.*

Filed May 29th, 1873.

N. W. TRIMBLE, *Clerk.*

183 *Amended petition.*

In the United States district court for the middle district of Alabama.

HARVY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

A petition by Harvey Terry, the original suitor in the above-stated cause, who appears in person, and, being without counsel, prays this honorable court for a re-opening and rehearing of its decree in this cause, dated June 11th, 1872, and, under the guidance and protection of this court, for such other and further proceedings as this court shall deem just and proper, for the following reasons, facts, and proofs, as stated and produced.

1st. Because the decree of June 11th, 1872, in this cause was a
184 premature decree, taken by the consent of counsel both for the plaintiffs and defendants, which had the effect to defeat the objects of this suit, namely, the collection of all of the assets, effects, collaterals,

or trust-funds belonging to said bank or liable for its debts, or at least sufficient thereof to pay all of the debts of said corporation, which object and fact your petitioner is prepared to prove has not been nor cannot be attained under said decree of June 11th, 1872, because your petitioner held, and various other creditors of said bank held, at the time of the filing of said decree, and now hold, many thousands of dollars of the bank-notes of said Commercial Bank not proved before the master in said cause, nor included in the debts of said bank in said decree, because your petitioner and other creditors were not informed of, and did
185 not know that a master had been appointed in said cause to take proof of the debts due by said bank, or that creditors could prove their said claims, and that sufficient notice was not given for creditors to prove claims, as shown by affidavits of creditors accompanying this said petition.

2nd. Because said decree is an impossible decree, in that by its terms it ordered and directed J. C. Compton, esq., who is the receiver in said cause (after deducting certain fees and charges) to distribute the assets of said bank, consisting of cash, bonds, bills, or notes, &c., pro rata, and in exact proportion to the value of said assets, to the amonnt of each claim as reported and allowed. Now, as by the report of said master in the cause a number of claims are allowed of seven, nine, ten, fif-
186 teen, twenty, and fifty dollars each, and various other small amounts, and as the smallest bond in the hands of said receiver is five hundred dollars, this court can readily perceive the impossibility of its receiver complying with said order, and, beyond the fact of making the exact amounts required, remains the difficulty of affixing the proportionate value of the different classes of securities to be distributed, and because said bonds were considered of doubtful validity and of uncertain value, and may become worthless.

3rd. Because said decree is an unjust decree, in that a very limited and insufficient notice of the appointment of a master to take an account of the debts of said bank, was published and given to the public, to come before said master and prove their claims against said bank,
187 while many such creditors did and do exist who held and now hold claims against said bank to many thousands of dollars who failed to prove their said claims for want of notice of their right to do so, who now wish to apply to prove their said claims in this said cause, who are now not only excluded from proof of claim and pro-rata share of the fund raised in this said cause, but barred and foreclosed forever by the terms of said decree from prosecuting their claims against said bank or stockholders thereof.

4th. Because the assets in the hands of said receiver in this stated cause, when reduced to cash, are insufficient to pay par on the claims of your petitioner and other creditors of said bank already proved
188 in the cause, and the liability of the stockholders of said bank under the charter to pay the balance of said debts remains uncollected and unappropriated thereto, while said decree discharges the stockholders of said bank from all liability to pay your petitioner or other creditors anything on account of any debt, claim, or demand now or heretofore subsisting against them; thereby depriving your petitioner and other creditors of their rights to proceed, in this cause or in any other suit, to collect many thousands of dollars of assets or trust-funds of said bank liable to the creditors of said bank for debts due to said creditors at the date of said decree.

5th. Because interest was allowed on the claims of Manning, and Deforrest, and W. S. Mudd, as proved in said cause, and interest was not allowed on the claim of your petitioner, although his bank-notes,

189 upon which his said suit was founded, were duly presented for payment, demand made thereon, and protested, and legally entitled to interest thereon to date of decree.

6th. Because the defendant in this cause was bound to know, and did know, that a very large amount of the bank-bills of said bank, approximating or exceeding one hundred thousand dollars, that remained outstanding at the date of said decree, would be and barred thereby; that your petitioner has applied to, and enquired of said receiver, who has the custody of the books of said bank, for information of the amount of the outstanding circulation of said bank at the date of said decree; but such information was evaded and refused to your petitioner to see said books, or ascertain the amount of such circulation outstanding.

190 7th. That said bank-notes were issued at par by said Commercial Bank, and put in circulation as money.

8th. That said defendant knew that Branch, Sons & Co., of Augusta, had held, or did then hold, a large amount of the bank-notes of said bank, and that such notes were shipped by express to said bank or its agent, and offered for redemption at 12½ per cent. on one-eighth part of their face-value, which offer of redemption was refused by said bank, and said notes returned to said Branch, Sons & Co., and said defendant had good reason to believe said bank-notes to be still the property of said firm at the date of said decree, and that said firm would gladly avail themselves of the right to file said bank-notes in said

191 cause if they knew of their right to do so, which notice defendant did not give before consenting to said decree.

9th. That your petitioner may be allowed to prove the fact that said bank depressed the market-value of its own notes to five or six cents on the dollar, and made redemption of its notes at or about these rates; that Jordan C. Compton, on behalf of said bank, at the time of the presentation of the notes of complainant for payment, and protest had thereon, said J. C. Compton offered to redeem said bank-notes at six cents on the dollar, on the plea that such payment was all the assets of said bank would pay, and all that said bank was paying for its notes.

10th. That the capital stock subscribed for and paid in by stockholders was five thousand shares of one hundred dollars each; that, by

192 the charter of said bank, each holder of shares in said bank is liable and bound to creditors for the debts of said bank to the amount of stock held by such shareholder, and that the principal number of shareholders and value of shares are solvent in said bank, and that no effort has been made by said receiver to collect the liabilities due thereon.

11th. That your petitioner may be allowed to read and file the affidavits of Thomas P. Branch, esq., James H. Phinzy, George P. Curry, Charles Shoneberg, Joel White, John V. Terry, B. F. Noble, W. R. Nelson, esq., John King, esq., and others, in support of said petition, and that your honor will hear the replications of your petitioner to the answers made and filed to said petition by the parties thereto called in.

193 12th. Your petitioner prays that he may be allowed to file a copy of the last report made by said Commercial Bank to the State auditor of Alabama, in accordance with law, dated October 15th, 1864, and refer to the statutes of the State of Alabama, bill No. 279, passed February 9th, 1856, chartering said Commercial Bank, and may be allowed to examine the books, records, and papers of said bank from the date of said report to the date of said decree of June 11th, 1872, and to report the result of such examination to this honorable court without delay, or that said decree may be declared opened or declared

void, and that such cause may be recommitted to master for such further proceedings thereon as this court may direct.

13th. That the defendant or receiver, or both of them, as this
194 court may direct, may be required to file, exhibit, or show by answer the amount of bank-notes of said bank redeemed since January 1st, 1869, by whom owned, date of redemption, and the price paid for such notes at redemption; also, what amount of bank-notes remained outstanding at the date of said decree, June 11th, 1872, and for a stay of the order in this cause, dated February 1st, 1873, and for such other and further relief as this honorable court may deem proper.

14th. That, since drawing the replications of your petitioner to said answers filed, and since the foregoing amended petition was drawn, your petitioner has become informed of further facts in this cause, as set forth in the affidavit of William A. Branch, esq're, and letter of Watts and Troy, of date of March 21st, 1873, to which papers your petitioner
195 asks the particular attention of this honorable court; that under all of the circumstances of this most remarkable case, and of the answers of said solicitors filed, what motives could, would, or did induce the signing of said consent-decree barring all creditors of said bank, and that relief may be granted.

HARVEY TERRY,
Petitioner.

HARVEY TERRY, *per se.*

Filed May 30th, 1873.

N. W. TRIMBLE, *Clerk.*

196 *List of stockholders in the Commercial Bank of Alabama.*

W. J. NORRIS, *Prest.* CAPITAL, $500,000. M. H. VANHOOK, *Cash'r.*

SELMA, ALABAMA, *Oct. 15th*, 1864.

COMMERCIAL BANK OF ALABAMA.

	Shares.		
John Brantley	16	Wm. J. Norris	100
F. S. Beeton	150	R. N. Philpot	20
E. A. Blunt	252	Isabella I. Porter	33
E. K. Carlisle	323	Oliver Powell	17
R. W. Craig	30	Est. of John M. Purnell	31
Jeremiah Collins	82	Mary P. Purnell	32
Isaac Croom	98	Joel Riggs, trustee J. Guard	49
N. H. R. Dawson	82	Lovina A. Shearer	6
J. C. Du Mont	100	John Steele	81
Otis Dyer	163	Thomas W. Street	10
Wm. M. Ford	17	Sarah F. Street	15
G. G. Griffin, jr	32	Robert W. Smith	50
Sam'l M. Goudy	82	H. A. Schrœder	50
A. L. Hardee	100	Geo. W. Tarleton	82
R. H. Hudson	20	Geo. W. Tate	163
J. R. John	17	Ned Tate	150
E. O. Johnson	50	Geo. A. Tuthill	81
Addra P. Johnson	31	R. B. Waller	41
F. L. Johnson	25	Nat. W. Waller	41
Wm. Jones, jr	326	Henry H. Ware	50
James Jones	163	P. J. Weaver	318
Jona. Jones	23	Ann P. Weaver	163
Imogen H. Lee	31	L. M. Wilson	100
A. G. Mabry	40	Jno. A. Winston & Co	63
B. F. Marshall	350	Mrs. P. A. Tuthill	25
John Mitchell	100	Willie G. Winn	100
197 W. P. Molett	326		
Richard Morton	100	Total shares	5,000

Condition of the Commercial Bank of Alabama, Saturday, October 15th, 1864.

To exchange on Mobile	5,073 78	By capital stock	500,000 00
bills discounted	114,513 89	" discounts received,	
bills receivable	19,704 03	" prem. on exchange,	
Alabama coupon bonds	391,500 00	" commissions and interest	47,820 85
Confederate States bonds	158,250 00	profit & loss	69,667 93
stocks bearing interest	212,500 00	due depositors	842,573 15
due from banks and other sources	354,160 25	dividends unpaid	6,228,00
E. A. Blunt, agent	157,169 66	circulation	872,996 00
protest account	30 30		
expense account	4,292 06		
banking-house & lot	35,000 00		
specie on hand	3,663 00		
notes of other banks, confederate & Alabama tr'y notes	883,429 96		
	$2,339,285 93		$2,339,285 93

M. A. VANHOOK, *Cashier.*
M. J. NORRIS, *President.*

In the United States district court for the middle district of Alabama, in equity. Fall term, 1872.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA.

198 I. W. ROBERTS, jr., a citizen of the State *of the State* of Alabama, residing in the city of Montgomery, makes oath and says that he is chief clerk in the auditor's office of the State of Alabama, at the State capitol in Montgomery; that as such clerk he has charge of the records of said office; that he has compared the above paper with the original report of the Commercial Bank of Alabama, as returned to said auditor's office, and finds the same to be a true and correct copy thereof.

I. W. ROBERTS, JR.

Sworn and subscribed to before me this 16th February, A. D. 1873.

J. F. DRESSER,
U. S. Commissioner Mid. Dist. of Ala.

Filed May 30th, 1873.

N. W. TRIMBLE, *Clerk.*

199 *Affidavit of J. H. Phinezy.*

In the United States circuit court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. May term, 1872.

JAMES H. PHINIZY, a citizen of the State of Georgia, residing at the city of Augusta, who, being duly sworn, makes oath and says that he is a creditor of the Commercial Bank of Alabama, the defendant in the

above-stated cause; that he is the owner and holder of four thousand eight hundred and seventy-five ($4,875.00) dollars of the bank-notes of said Commercial Bank, and that the same are due and unpaid; that he did not know of the suit in this cause and the appointment of a master to take an account of the assets of said bank, and also to take
200 accounts of liabilities and debts due by said bank, and that creditors were required to make proof of such claims before said master, until after the decree of June 11th, 1872, had been rendered in this court in this cause, whereby this deponent is prevented from filing his said bank-notes as a claim for pro rata dividend out of the fund in court in this cause, as this deponent desired and now wants to do, and most respectfully asks that this court will re-open said decree of June 11th, 1872, and proceed to a further proof of claims and hearing of said cause.

That this deponent is informed and verily believes that said decree of June 11th, 1872, was a consent-decree, hastened and obtained by collusion of the attorneys for both the plaintiffs and defendant in this cause before your deponent and other creditors in like condition ob-
201 tained notice or information of their right and privilege to file their claims in this cause, thereby defeating the ends of justice and the objects of this suit, which was to collect in and make available all of the assets and securities and trust-funds of said bank, and to give a full and extensive notice to all creditors, and to allow and pay all debts due by said bank, or their pro rata share thereof, which was prevented by the terms of said decree of June 11th, and by the fact, as your deponent believes, of its being prematurely given; and said assets and trust-funds have not been fully collected, nor have the debts due by said bank been fully paid under said decree.

J. H. PHINIZY.
J. H. PHINIZY.

202 Sworn to and subscribed before me this 28th day of January, 1873.

A. P. BOGGS,
Not. Public, Richmond City, Ga.

Subscribed and sworn to before me this eighth day of February, A. D. 1873.

THE SEAL OF J. P. CARR, U. S. COMMISSIONER SOU. DIST. OF GEORGIA.

JOSEPH P. CARR,
U. S. Commissioner, Southern District of Georgia.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

Affidavit of B. F. Noble.

In the United States district court for the middle district of Alabama.

HARVEY TERRY *vs.* THE COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

B. F. NOBLE, esq., a citizen of Alabama, residing in the city of Montgomery, makes oath and says:

That he filed a claim of bank-notes against said Commercial Bank in

said cause before the master; that he was at the time, and still is, the holder and owner of the further sum of nine hundred and fifty dollars of such bank-notes held by him since early in the year 1865, omitted to be proved in said cause before the master, the filing of said decree of June 11th, 1872, because deponent overlooked said notes, they being in a separate bundle; that he had no knowledge of the decree of
204 June 11th, 1872, until after the adjournment of this said court for the term.

BENJ. F. NOBLE.

Sworn to and subscribed before me this 19th day of February, A. D. 1873.

J. F. DRESSER,
U. S. Commissioner.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

205 *Affidavit of J. S. Wright.*

In the United States circuit court for the district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } term, 1873.

JOSEPH S. WRIGHT, esq., of the city of Philadelphia, Pennsylvania, who being duly sworn, deposes and says that he is the assignee of John Hardy, esq., of Selma, Alabama, a creditor unpaid of the Commercial Bank of Alabama; that he, the said Wright, is a creditor of said Commercial Bank to the amount of one thousand dollars for the bank-notes of said bank; that he, said Wright, had no knowledge that said bank was in process of liquidation in the year 1872, or that a receiver had been appointed under an order of this court in this cause, or that said receiver had advertised for all parties holding claims against
206 said bank to present them for proof and adjudication in this cause. He therefore prays that this cause may be re-opened and reheard by the court, and he hereby authorizes Harvey Terry, his attorney in fact, to appear, act, and do all things necessary in this cause for me that I could do personally.

JOSEPH S. WRIGHT.

PHILADELPHIA, *January 10th*, 1873.

U. S. OF AMERICA,
E. D. of Penn'a., ss:

Before me, the subscriber, a commissioner in and for said district, personally appeared Joseph S. Wright, who, having been duly sworn according to law, deposes and says the facts set forth in the foregoing paper are true to the best of his knowledge and belief.

JOSEPH S. WRIGHT.

Sworn to and subscribed this 10th day of January, 1873.
[U. S. COMMISSIONER'S SEAL.] CHAS. P. CLARKE,
U. S. Comm'r.

Filed in open court April 22d, 1874.

N. W. TRIMBLE, *Clerk.*

207 *Affidavit of Joel White.*

In the United States circuit court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. term 1872.

JOEL WHITE, esq., a citizen of the State of Alabama, residing at the city of Montgomery, who being duly sworn, makes oath and says that he is the owner and holder of three hundred and three dollars of the bank-notes of the Commercial Bank of Alabama, and that he is a creditor of said bank to that amount; that he did not know of this suit in the above-entitled cause, nor the appointment of a master to receive proof of the debts due by said bank; and if he had known that such master had been appointed in this cause to take proof of debts due by said bank before June 11th, 1872, that he would have proved said debt, and now wants to prove said debt in said cause.

JOEL WHITE.

Sworn to and subscribed before me this 10th February, A. D. 1873.
J. F. DRESSER,
U. S. Commissioner Mid. Dist. Ala.

Filed in open court April 22d, 1874.
N. W. TRIMBLE, *Clerk.*

208 *Affidavit of W. R. Nelson.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
THE COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

Personally appeared before me W. R. Nelson, a citizen of Alabama, residing at Selma, and, being duly sworn, says that on or about the 3rd day of June, 1871, this deponent, in company with Harvey Terry, did present for payment a large sum of the bank-notes of the Commercial Bank of Alabama, amounting to several thousand dollars, according to deponent's best recollection, (and the exact amount of which as well as the date may be seen by reference to deponent's certificate of protest of said bills,) to N. H. R. Dawson, esq'r, as president of said bank,
209 at his office in Selma, and did also present the same bills or bank-notes to J. C. Compton, esq., at his office in Selma, as the officer or business agent of said bank, and did demand payment thereon and was refused, but to the best of affiant's recollection said Compton made a proposition to said Terry to take up or redeem said bank-notes at a very small percentage, and to affiant's best recollection the sum offered by said Compton did not exceed eight or ten cents on the dollar, and may have been six cents on the dollar.

Said demand as above was made by affiant (at the request of said Terry) as a notary public for Dallas County, Alabama, and said bills were protested by affiant as a notary public.

W. R. NELSON.

Sworn to and subscribed before me this 7th February, 1873, by the said W. R. Nelson, at Selma, Alabama.

210 In testimony whereof I have hereunto affixed my hand and seal of office the day and year above written.

HUGH S. D. MALLORY,
United States Commissioner for the Middle District of Alabama.

Filed April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

211 *Affidavit of Jno. King.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

JOHN KING, esq., (banker,) a citizen of the State of Georgia, residing in the city of Columbus, makes oath and says that he is the owner and holder of one hundred and seventy-eight dollars of the bank-notes of the Commercial Bank of Alabama, the defendant in the above-stated case; that he has held and owned said notes before and since the 1st day of January, 1872; that had no knowledge of the suit in said case; or the appointment of a master therein to take proof of claims; that deponent has used reasonable diligence to hear of and find out about any suit being brought against said bank, and failed to

212 ascertain the existance of the above suit until long after the decree of June 11th, 1872, in this case was made, and that deponent would gladly have availed himself of the right to file, and now wants to file, said notes in said case; and deponent believes the notice given by the master in said case to be entirely inadequate notice for all creditors to file their claims.

JOHN KING. [L. S.]

Sworn to and subscribed before me this 20th day of February, 1873.

L. T. DOWNING,
U. S. Commr. So. Dist. Ga.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk*

213 *Affidavit of Jno. V. Terry.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

JOHN V. TERRY, a citizen of the State of Virginia, residing in the city of Richmond, makes oath and says that for some years he has had the keeping of a large amount of old and broken bank-notes, the property of Harvey Terry, complainant in this cause; that some time in the spring of 1872, this deponent forwarded to Harvey Terry, a large package of these notes of said bank, amount not counted, but believed to contain

about five thousand dollars, for the purpose, as represented, to file in the above cause in court; said bank-notes had laid in bank vault in Richmond for some years (at least 2 or 3 years) as the property of
214 said complainant.

JOHN V. TERRY.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

This day personally appeared before me, Thomas S. Atkins, a United States commissioner, duly appointed by the circuit court of the United States for the eastern district of Virginia, John V. Terry, whose genuine signature appears to the foregoing writing, and made oath that the statements made therein are true to the best of his knowledge, information, and belief.

In testimony whereof I have hereunto set my hand at Richmond, in said district, this 10th day of February, A. D. 1873.

THOMAS S. ATKINS,
U. S. Commissioner E. Dist. of Va.

Filed in open court April 22d, 1874.

N. W. TRIMBLE, *Clerk.*

215 FEBR'Y 10TH, 1873.

DEAR BRO.: Yours received 45 minutes ago. I hasten to send this, as desired. All pretty well.

In haste, bro.,

JOHN.

Filed in open court April 22d, 1874.

N. W. TRIMBLE, *Clerk.*

Affidavit of E. H. Levy.

216 In the United States circuit court for the southern district of Alabama.

UNITED STATES OF AMERICA,
Southern District of Alabama:

HARVEY TERRY, PLAINTIFF,
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1873.

E. H. LEVY, esq., broker, a citizen of the State of Louisiana, residing at New Orleans, makes oath and says that during the year eighteen hundred and sixty-eight he made redemption of the bank-notes of said Commercial Bank through J. C. Compton, acting as cashier or agent, to the amount of more than ten thousand dollars, and received eleven cents on the dollar for said notes; that I have now as owner several hundreds of dollars of said bank-notes held for years; that I
217 never heard of the suit in the above-entitled cause until after the decree of June 11th, 1872, had been made in said cause; that a notice published in the Montgomery Advertiser and Mail for six weeks is not sufficient notice to inform all holders of bank-notes of said Commercial Bank of their right to file said notes as claim for payment in

said cause, and that I wish to file said bank-notes for payment now, if I am granted the right to do so.

New Orleans, Jan'y 1st, 1874.

E. H. LEVY.

Subscribed and sworn to before me this 1st day of January, 1874.

SEAL OF D. URBAN, U. S. COMM'R DIST. OF LA.

D. URBAN,
U. S. Comm'r.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

218 *Affidavit of J. Jordan.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

JUNIUS JORDAN, esq're, a citizen of Alabama, residing at Eufaula, makes oath and says that he is a creditor of the Commercial Bank of Alabama, the defendant in this suit, and has been such creditor since about the year 1868, to the amount of fifty dollars; that he had no knowledge or information of the suit in the above-stated cause, nor of a master being appointed in said cause to take account of claims therein; that if he had known of such suit and right to prove his said claim, he would gladly have done so, and now asks permission of
219 said court that the decree of June 11th, 1872, may be so far stayed or annulled as to allow him to prove said claim.

JUNIUS JORDAN.

Sworn to and subscribed before me this 13th Feb.

A. W. COCHRAN,
U. S. Comm'r for Mid. Dist. of Ala.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

220 *Letter of Watts and Troy.*

OFFICE OF WATTS AND TROY,
ATTORNEYS AND COUNSELLORS AT LAW,
Montgomery, Ala., March 21, 1873.

MR. E. H. PRINGLE,
Charleston S. C.:

DEAR SIR: The Commercial Bank of Alabama has been wound up on a bill filed by Harvey Terry in the United States district court here, in which we were of counsel for Terry. Some of the bill-holders who failed to come in under this decree, contemplate attempting to get rid of its effect in excluding them. We think the effort, if made, will fail; but we are not in a position to represent or advise them, and we suggest that your friend referred to in yours of 8th inst. corres-
221 pond with Messrs. Stone and Clopton, or Messrs. Semple and Cooke, of this city, who are competant and reliable attorneys,

and have had no connection with the litigation. Terry himself held bills which he did not place in the hands of his attorneys, nor inform them about, and which were excluded, and he is seeking to open the decree to get them in. Messrs. Branch, Sons & Co., of Augusta, Geo., were also bill-holders to a large amount, and were also excluded, and desire to open the decree. So far as we can learn, no counsel have been retained as yet in the matter, but Messrs. Branch, Sons & Co. have consulted Messrs. Semple and Cooke.

Very respectfully,

WATTS & TROY.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

222 *Letter of Sayre & Graves.*

SAYRE & GRAVES' LAW-OFFICE, No. 1 COURT SQUARE,
Montgomery, Ala., Febr'y 25th, 1874.

JOHN H. JAMES, Esq.,
Atlanta, Geo.:

DEAR SIR: In reply to yours concerning suit vs. Commercial Bank of Alabama, at Selma, I would say I filed a bill against that bank and its stockholders, for one Harvey Terry, some two years ago, and had a receiver appointed under the statute. We dug up enough assets of the bank to pay very nearly dollar for dollar of the bank-bills which were presented. For some reason Terry had some five thousand dollars which he never sent us to present; hence we drew the decree with so much stringency as to prevent any other presentations, and in
223 a few days Terry brought the bills in person, but found they were shut out by the decree, so he received a dividend only on those which we had presented for him. He has ever since been trying to open the decree, but has hitherto failed. Of course we could not attack our own decree, and refused to be employed by him to do so. We are of the opinion that this decree could be pleaded in bar of any other proceedings against the bank. This is our opinion, tho' it may be otherwise; still we are unwilling to advise another suit in the face of these proceedings, as it would involve several hundred dollars in costs and our fees, as the proceedings would have to be against the stockholders in the next suit, for the assets of the bank are exhausted, which were about $50,000.

Very truly,

SAYRE & GRAVES.
By W. H. GRAVES.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

224 *Affidavit of Geo. P. Curry.*

In the United States court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. November term, 1872.

GEORGE P. CURRY, a citizen of the State of Georgia, residing in the city of Augusta, who being duly sworn, makes oath and says that he is

a creditor of the Commercial Bank of Alabama, the defendant in above above-stated case; that he is the owner and holder of thirty-five ($35.00) dollars of bank-notes of said bank, and that same are due and unpaid; that he has held them since the first day of January ; that he did not know of the suit in this cause, and the appointment of a master to take an account of the assets, securities, and trust-funds of said bank, and
225 also to take an account of the liabilities and debts due by said bank, and that he gave full and due notice to creditors to make proof of their claims before said master; that no information of the matter was known to this deponent until after the decree of June 11th, 1872, was rendered in this court in this cause, whereby this deponent is prevented from filing his said bank-notes as a claim for pro rata dividend out of the fund raised or to be raised in this cause in this court, as this deponent desired and now wants to do, and most respectfully asks that this court will re-open the said decree of June 11th, 1872, and proceed to a further proof of claims and hearing of said cause; that this deponent is informed and verily believes that said decree of June 11th last was a premature consent—decree hastened and obtained by
226 collusion of the attorneys of the plaintiffs and defendants combining to obtain such decree before your deponent and other creditors of said bank in like condition obtained information of their right and privilege to file their claims in this cause, thereby defeating the ends of justice and equity, and the objects of this suit, which was to collect in and make available all of the assets, securities, and trust-funds of said bank for the payment of all of the debts due by said bank, which was prevented by the terms of said decree of June 11th, 1872, and by the fact, as your deponent believes, of its being prematurely obtained for the purpose above stated; and said assets and trust-funds have not been fully collected, nor have the debts, nor will the debts due by said bank be fully paid under said decree.

G. P. CURRY.

FRANK I. MOSES,
[L. S.] *Not. Pub. Richmond Co., Ga.*

227 Sworn to and subscribed before me this sixth day of February, A. D. 1873.

{SEAL OF J. P. CARR, U. S. COMM'R SO. DIST. OF GA.} JOSEPH P. CARR, *U. S. Commissioner Southern District of Georgia.*

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

228 *Affidavit of E. M. Garnett.*

UNITED STATES OF AMERICA,
Southern District of Alabama:

In the United States circuit court for the southern district of Alabama.

HARVEY TERRY, COMPLAINANT,
vs.
COMMERCIAL BANK OF ALABAMA, DEFENDANT. } In equity. Fall term, 1873.

E. M. GARNETT, esq., a citizen of the State of Virginia, residing in the city of Richmond, makes oath and says that he is the receiver of the

estate, assets, and effects of the Bank of Phillippi, a corporation of the State and formerly doing business in the State of Virginia; that he is also the receiver of the Monticello Bank of the State and formerly doing business in the State of Virginia; that, acting as such receiver, he
229 knows the time given in the notices for creditors to appear and file their claims for bank-notes or other liabilities against the estate of such insolvent corporations; that such notices was published in Richmond State Journal and Charlottesville Chronicle, newspapers in the State of Virginia, and such advertisement continued for the space of eight weeks, and that after the expiration of such notices that it is the custom of the master in the said causes to receive proof of and file as proof of claim in the causes any and all of the bank-notes of such bank as were presented to him for that purpose; that the dates from which the filing of said bank-notes as claim against said Bank of Phillippi and Monticello banks was commenced about the month of December, eighteen hundred and sixty-nine, (1869,) and that the same was continued
230 and allowed by the court for about three (3) years in both of the causes against the above said banks; that he knows the practice or what has been done in administering on and closing up the affairs of a number of the insolvent banking corporations of the State of Virginia, such as the Bank of Virginia, Farmers' Bank of Virginia, the Exchange Bank of Vir ginia, &c., and in all those causes wide-spread notices were published for all creditors to prove their claims, and the time finally extended for allowing the proof of claims in said causes to more than two years.

E. M. GARNETT,
Receiver, &c.

Sworn to and subscribed before me this 9th day of February, 1874.
M. F. PHEASANT,
U. S. Commissioner E. Dist. Va.

Filed in open court April 22d, 1874.
N. W. TRIMBLE, *Clerk.*

231 *Affidavit of David Mayer.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

DAVID MAYER, esq., a citizen of the State of New York, residing in the city of New York, makes oath and says:

That he is the owner and holder of fifty-two $\frac{50}{100}$ dollars of the bank-notes of the Commercial Bank of Alabama, the defendant in the above-stated cause, held by him since the year 1863; that he had no knowledge of the above-stated suit, or that a master had been appointed in said cause, or that said master had advertised for all parties holding claims against said Commercial Bank to come forward and prove said
232 claims until long after the decree of June 11th, 1872, had been rendered in the cause; that this deponent would gladly have availed himself of the right to file his said bank-notes in said cause if he had known of his right to do so; and will file said notes if said decree is re-opened and he is allowed to do so.

That an advertisement in one newspaper, the Montgomery Advertiser and Mail, for sixty or ninety days, for all creditors to come forward and prove their claims in said cause, your deponent believes to be insufficient notice to all creditors of said bank, because said bank's promises to pay were scattered over a large part of the United States, and the circulation of the Montgomery Advertiser and Mail does not extend outside of the State of Alabama to any considerable extent, and
233 therefore the holders of bank-notes of said Commercial Bank were not duly notified.

Your deponent is informed and believes that said decree of June 11th, 1872, in this cause was a consent decree, made barring all creditors, and that sufficient assets or trust-funds remain uncollected and unappropriated to pay all creditors in full.

DAVID MAYER.

Sworn to before me 20th day of March, 1873.
[SEAL OF U. S. COMM'R.] JOHN A. SHIELDS,
U. S. Commissioner So. Dist. N. Y.

Filed in open court April 22nd, 1874.
N. W. TRIMBLE, *Clerk.*

234 *Affidavit of Thomas P. Cain.*

In the United States court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

I, Thomas P. Cain, a citizen of the State of Kentucky, residing in the city of Louisville, makes oath and says:

That he is the owner and holder of ($260.00) two hundred and sixty dollars of the bank-notes of the Commercial Bank of Alabama, the defendant in the above-stated cause, held by him since the year 1863; that he had no knowledge of the above-stated suit, or that a master had been appointed in said cause, on that said master had advertised for all parties holding claims against said Commercial Bank to come forward and prove said claims until long after the decree of June 11th, 1872, had been rendered in the cause; that this deponent would
235 gladly have availed himself of the right to file his said bank-notes in said cause if he had known of his right to do so, and will file said notes if said decree is re-opened and he is allowed to do so.

That an advertisement in one newspaper, the Montgomery Advertiser and Mail, for sixty or ninety days, for all creditors to come forward and prove their claims in said cause, your deponent believes to be insufficient notice to all creditors in this cause, because said bank's promises to pay were scattered over a large part of the United States, and the circulation of the Montgomery Advertiser and Mail does not extend outside of the State of Alabama to any considerable extent, and therefore the holders of bank-notes of said Commercial Bank were not duly notified.

Your deponent is informed and believes that said decree of June 11th, 1872, in this cause was a consent decree, made barring all
236 creditors, and that sufficient assets or trust-funds remain uncollected and unappropriated to pay all creditors in full.

THOMAS P. CAIN.

Subscribed and sworn to before me by Thomas P. Cain, who is to me personally known to be a member of the firm of Slevin and Cain, this 5th day of March, A. D. 1873.

N. R. WILSON,

{SEAL OF N. R. WILSON, U. S. COMMISS'R FOR THE STATE OF KENTUCKY, JEFFERSON CO., KY.} *Notary Public in and for Jefferson County, Kentucky, and U. S. Commissioner Circuit Court of the United States for the District of Kentucky.*

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

237 *Affidavit of Charles Shonberg.*

In the United States circuit court for the middle district of Alabama.

HARVEY TERRY *vs.* COMMERCIAL BANK OF ALABAMA. } In equity. Nov'r term, 1872.

Charles Shoneberg, a citizen of the State of Alabama, residing in the city of Selma, who, being duly sworn, deposes and says that he is a creditor of the Commercial Bank of Alabama, the defendant in the above-stated cause; that he is the holder and owner of eleven hundred and twenty-six $\frac{00}{100}$ dollars bank-notes of said Commercial Bank; that the same are due and unpaid; that he held said notes a long time previous to the 11th day of June, 1872; that he did not know of the suit in the above-entitled cause, nor the appointment of a master therein to take an account of the assets, securities, and funds of said bank, and also
238 to take an account of the liabilities and debts due to creditors by said bank, and that said master give full and due notice to creditors to make proof of their claims before said master. That owing to the limited notice of such reference by this court to the master, this deponent remained ignorant of such reference and of his right or ability to file said bank-notes in this cause until after the decree of June 11th, 1872, was rendered and filed in this court, whereby this deponent was prevented and is prevented from filing his said bank-notes as a claim for pro-rata dividend out of the fund raised in this cause, as this deponent desired and now wants to do, and this deponent most respectfully asks that this court will re-open said decree of June 11th, 1872, and proceed to a further proof of claims against said bank and hearing of said
239 cause. That this deponent is informed and verily believes that said decree of June 11th last was a premature-consent decree, hastened and obtained by collusion of the attorneys of the plaintiffs combining with the attorneys of the defendant to obtain such decree, before your deponent and other creditors of said bank in like condition obtained information of their right and privilege to file their claims in this cause, thereby defeating the ends of justice and equity, and the objects of this suit, which was to collect in and make available all of the assets, securities, and trust-funds of said bank for the payment of all of the debts due by said bank, which accomplishment was prevented by the terms of said decree of June 11th, 1872, and by the fact, as your deponent is informed and believes, of its being prematurely obtained for the purposes above stated; and that the assets of said bank and the trust-fund
240 thereto belonging have not been collected in full, nor have the debts nor will the debts due by said bank ever be fully paid under said decree.

CHARLES SHONBERG.

Sworn to and subscribed before me by the said Charles Shonberg at Selma, Alabama, this 30th day of January, 1873.

In testimony whereof I have hereunto placed my hand and affixed my seal the day and year above written.

{ SEAL OF U. S. COMMISS'R MID. DIST. OF ALA. }

HUGH S. D. MALLORY,
United States Commissioner for the Middle District of Alabama.

Filed in open court April 22*rd*, 1874.

N. W. TRIMBLE, *Clerk.*

241 *Affidavit of Thomas P. Branch.*

In the United States district court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

I, Thomas P. Branch, a citizen of the State of Georgia, residing in the city of Augusta, who, being duly sworn, makes oath and says that he is one of the firm of Branch Sons and Co.; that said firm are the owners and holders of eight thousand four hundred and twenty-five dollars of the bank-notes of said Commercial Bank of Alabama, which bank-notes your deponent believes to have been issued at par, and that said firm on the second day of July, 1869, did remit to Jordan C. Compton, as agent of said Commercial Bank, for redemption of said bank-
242 notes at 12½ per cent. or one-eighth part of their face value, but said bank, by its agent, refused to redeem said bank-notes at twelve and one-half per cent., as will more fully appear from the following letter from said bank:

"COMMERCIAL BANK OF ALABAMA,
"*Selma, Ala., July 5th,* 1869.

"Messrs. BRANCH SONS & Co.,
"*Augusta, Ga.:*

"DEAR SIRS: Yours of the 2nd inst. is received, giving notice of your having sent by express $8,425 Commercial Bank notes for redemption at 12½ %. I am directed by the president of the bank to enclose to you an extract from a letter written to you July 13th, 1868, and to say that the notes are in the hands of the express co., subject to your orders.

"Yours, truly,
(Signed) "J. C. COMPTON,
"*Act'g Cash'r.*"

243 Extract referred to, as follows:

"COMMERCIAL BANK OF ALABAMA,
"*Selma, Ala., July 13th,* 1868.

["Extract.]

"Messrs. BRANCH SONS & Co.,
"*Augusta, Geo.:*

"DEAR SIRS:

* * * * * * *

"We are now paying five cents for notes, with one cent to our pur-

chasers. Under no considerations will we pay above this price in future. I was of the opinion that I had notified you of the reduction, but have ascertained that I was mistaken.

"Yours, truly,

(Signed) "J. C. COMPTON.
"*Act'g Cash'r.*"

The foregoing letter and extract was received from said bank in reply to the letter from your deponent, as follows:

244 "AUGUSTA, GA., *July 2nd*, 1869.

"J. C. COMPTON, *Cash'r*,
"*Selma, Ala:*

"DEAR SIR: We send you to-day, per express, prepaid, 8425 Commercial Bank notes @ 12½, $1,053.12, for which please remit us in New York exchange.

"Yours, resp'ly,

(S'g'd) "BRANCH SONS & CO.
"Per I. S. BEAN."

Your deponent further affirms that the said firm of Branch Sons & Co. have continued to own the said eight thousand four hundred and twenty-five dollars of Commercial Bank notes up to this date, and that said Commercial Bank, its officers or agents, knew that said firm
245 still remained the owners of said bank-notes, since J. C. Compton told your deponent, in Selma, Ala., in the month of July, 1872, that he had not advised your deponent of the Commercial Bank being in court, because William White, Lapsley, Morgan, and others, parties to the Commercial Bank case, protested against his notifying us; and whereas if your deponent had been advised of what was transpiring, said firm would gladly have availed themselves of the right to file said eight thousand four hundred and twenty-five bank-notes for pro-rata shares of assets in this cause, had they known of their right to do so, before the master in this cause at any time before the decree of June the 11th, 1872, of which your deponent was wholly ignorant until after the decree was obtained, which your deponent believes was obtained by consent of defendant, and said decree was hastened to prevent said
246 firm from participating therein. Mr. Troy, of the firm of Watts and Troy, told your deponent, in July, 1872, in the city of Montgomery, that opposing counsel were only brought to consent to the decree by his, Mr. Troy's, threatening to have deponent telegraphed and have said bank-notes put in; and your deponent further affirms that neither he nor the firm of Branch Sons & Co. knew that said Commercial Bank had been placed in liquidation by process of this court, nor that a master in chancery had been appointed by said court to take account of the assets of said bank, nor to receive proof of and take account of the debts due by said bank, and make distribution thereon, until after the decree of June 11th, 1872, had been made by this court in this cause, and the adjournment of this court for the term, whereby the firm of Branch Sons & Co. have
247 been prevented from proving their said bank-notes in this cause, as they now wish to do, and would have done had they known that such opportunity and right existed.

That your affirmant has been informed, and verily believes, that said decree of June the 11th, 1872, was a consent decree, obtained by the collusion of the counsel of the plaintiff and defendant combining and

hastening said decree for the purpose of preventing Branch Sons & Co., and other creditors of said bank in like condition, from proving their claims in said cause, and thereby defeating the object of said suit.

T. P. BRANCH.
THOMAS P. BRANCH.

Subscribed and sworn to before me at Augusta, in the county of Richmond and State of Georgia, in the southern district of Geor-
248 gia, on this seventh day of February, A. D. 1873.

SEAL OF J. P. CARR, U. S. COMM'R SO. DIST. GEORGIA.

JOSEPH P. CARR,
U. S. Commissioner
Southern District of Georgia.

Filed in open court April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

249 *Affidavit of George Goldthwaite.*

UNITED STATES OF AMERICA,
Southern District of Alabama:

Spring term, 1873.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity.

I, George Goldthwaite, of the firm of Bennett, Goldthwaite & Co., bankers and brokers, of the city of Mobile, and resident of the State of Alabama, makes oath and says that said firm is the owner and holder of three hundred and fifty ($350) dollars of the bank-notes of the Commercial Bank of Alabama, the defendant in the above-stated cause; said bank-notes he believes to have been issued by said bamk at par, and were held by said firm prior to June 11th, 1872, and that neither he nor said firm did not have any knowledge of the above-stated suit
250 against said bank, (although he is a banker and broker, and it is a part of his business to hear of and ascertain such facts,) nor that a master had been appointed in said cause, or that said master had advertised for all parties holding claims against said Commercial Bank to come forward and prove said claims, or thereafter be barred, until long after the decree of June, 11th, 1872, had been rendered in said cause; that this deponent and the firm of Bennett, Goldthwaite and Co. would gladly have availed themselves of the right to file his and their said bank-bills in said cause if they had known of their right to do so, and will file said notes as claim if said decree is re-opened and he is allowed to do so; that an advertisement in one newspaper (that being the Montgomery Advertiser and Mail) for all creditors to come forward
251 and prove their claims in said cause, your deponent believes to be entirely insufficient notice to all creditors in this cause, because said bank's promises to pay were scattered over a large part of the United States, and the circulation of said newspaper was not sufficient to possibly convey the information to all such creditors; and therefore all creditors were not duly notified. Your deponent is informed and believes that said decree of June 11th, 1872, in this cause was a con-

sent decree, barring all creditors, and that sufficient assets or trust-funds remain uncollected and unappropriated to pay all creditors at par.

GEORGE GOLDTHWAITE.

Subscribed and sworn to before me this 27th day of May, A. D. 1873.

JAMES GILLETTE,
U. S. Commissioner Southern Dist. of Alabama.

Filed in open court April 27th, 1874.

N. W. TRIMBLE, *Clerk.*

252 *Affidavit of Harvey Terry.*

UNITED STATES OF AMERICA,
Southern District of Alabama:

In the United States circuit court for the southern district of Alabama.

HARVEY TERRY, PLAINTIFF,
vs.
COMMERCIAL BANK OF ALABAMA, defendant. } In equity. Fall term, 1873.

Harvey Terry, the complainant in the above-stated cause, being duly sworn, deposes and says that, although plaintiff in the above-stated cause, he did not know that a master had been appointed to take proof of claims against said bank in said cause previous to decree of June 11th, 1872, in this cause, whereby all persons holding claims against said Commercial Bank, by the terms of said decree, were barred
253 and foreclosed. That said complainant at the date of said decree and for a long time previous had held a large amount of the bank-notes of said Commercial Bank, deposited in the State of Virginia, and not in suit in said cause, (to wit, about five thousand dollars,) but intended to be put in proof when said cause had progressed to condition to allow said proof to be made. That said complainant holds of his own notes of said bank and notes of other persons, as agent and attorney in fact, to about seventeen thousand dollars; that he knows of a number of other holders of said bank-notes, some of whom have made affidavit of desire to have said bank-notes proved in said cause. That there now remains a fund in the hands of J. C. Compton, esq., receiver in said cause, undivided and undistributed, consisting of
254 one hundred and forty-seven dollars in cash, and eight thousand six hundred and seventy-eight dollars in bonds of the city of Selma, as shown by the report of said receiver, filed December 23rd, 1873, in this cause.

Your complainant is informed and believes that the chartered privileges and corporation of said bank created a statute liability against each and every stockholder of said bank to pay the debts and liabilities of said bank existing at the time of its failure; that said bank-notes was an existing liability at the time of its failure; that your complainant is informed and believes that the capital stock in said bank paid in was five hundred thousand dollars.

That your deponent holds the certificate of the secretary of
255 state of Alabama, dated April 13th, 1871, giving list of the stockholders of said Commercial Bank as returned by the officers of said bank, under date of October 15th, 1864, to the department at Montgomery, in accordance with law, showing capital of bank $500,000.00, and your deponent is informed and believes that about one-half in

amount of said stockholders are solvent, and that the unpaid debts of said Commercial Bank is a subsisting liability against them.

HARVEY TERRY.

Sworn and subscribed before me this 3rd day of January, 1874.

N. W. TRIMBLE, *Clerk, &c.*

Filed January 3rd, 1874.

N. W. TRIMBLE, *Clerk, &c.*

256 *Affidavit of Wm. A. Branch.*

In the U. S. district court for the middle district of Alabama, fall term, 1872.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA.

William A. Branch, a citizen of the State of Georgia, and residing in the city of Augusta, makes oath and says that in the month of November of 1872 he came to the city of Montgomery to represent the interests of Branch Sons & Company in the above-stated cause; that he applied to D. S. Troy, esqr., at his office, one of the counsel for the plaintiff, to employ said Troy as solicitor to assist in opening said cause for further proceedings therein; that said Troy told your deponent that said cause had been finally closed by his consent to the final decree of June 11th, 1872, in the aforesaid cause; that aforesaid decree was a consent decree to get the assets, then in the hands of the receiver, for the benefit of parties who had filed their claims in aforesaid cause, and to prevent any more claims being filed or further suits being brought against the Commercial Bank or stockholders thereof; and that
257 he, Troy, could under no circumstances or consideration *could* be employed as solicitor in a suit against the Commercial Bank or its stockholders in an attempt to break or open decree of June 11th, 1872; in his own language, "he would be acting in bad faith to parties consenting" to aforesaid final decree; and further, said Troy said he would take no action in opposing the opening of aforesaid final decree, nor could he be employed to resist it, but that in the event it was opened he would then be ready to undertake the collection and suit of aforesaid Branch Sons & Co. against the aforesaid bank and the stockholders without any compromise on his part; and Troy further said that certain parties knew of the existence of certain other creditors whose claims had not been filed, and who would be forever barred a participation in the assets of aforesaid bank, then in the hands of the receiver, by pushing a closure of aforesaid final decree; and aforesaid Troy further said that defendant's attorneys only consented to a division of the assets of aforesaid bank amongst creditors and bill-holders whose claims
258 had been proven upon condition that aforesaid bank and its stockholders should be forever discharged from any further liability or suit whatever; and such was the object and true intent of aforesaid final decree.

(S'gn'd) WILLIAM A. BRANCH.

Sworn to and subscribed before me this 11th of February, A. D. 1873.

(S'gn'd) J. F. DRESSER,
United States Commissioner Middle District of Alabama.

Filed in open court April 22nd, 1874.

(S'gn'd) N. W. TRIMBLE, *Clerk.*

259 *Replication.*

In the United States circuit court for the middle district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity. Fall term, 1872.

Replies of Harvey Terry, the petitioner in the above-stated cause. Petition filed January 30th, 1873.

This reply is made in support of said petition, and in reply to the answers of the several parties ordered to appear and answer thereto, whose answers are now on file in this cause, and says:

GRAVES.

Your petitioner replies to that part of the answer of W. H. Graves, esq., which he considers material for him to answer, and says that at the time of making protest of the three thousand and ninety-three ($3,093) dollars of the bank-notes of said Commercial Bank, now
260 in proof in this cause, demand was made upon the proper parties for the payment of said bank-notes, and payment refused, and although the protest thereof may not have complied with the statute of Alabama by writing the fact upon each note, yet the demand was made, and such demand was sufficient to carry interest from date of demand, and that your petitioner delivered said notes to said Graves and Rhea with protest of said notes attached, and did inform them of these facts, and at the time of making such delivery of notes did inform them, and Mr. Rhea (now dead) particularly, that your petitioner held and owned other bank-notes of said bank, to wit, five thousand dollars, then laying in bank at Richmond, Va., and had been offered twelve thousand dollars more of said bank-notes for sale, and that your petitioner expected to buy them; that, in drawing said complaint, said attorneys
261 might as well name twenty thousand dollars as the sum in suit, as your petitioner certainly expected to get the $12,000, which amount, with what your petitioner then owned, would make the sum named in the complaint; and that this fact that $20,000 was the sum named in the complaint, (and that what your petitioner owned at that date, with the $12,000 which was to be brought, would complete the sum named,) which fact was orally admitted by said Graves to be true at the examination had in this cause February 1st, 1873.

Your petitioner admits telling said Graves, upon his return from Mississippi, that he failed to get the $12,000 expected, and to go on with the suit; and from these mingling of circumstances and facts, your petitioner insists that the memory of said Graves was defective; that he either was not informed by Mr. Rhea of the notes laying in
262 Richmond, Va., or had forgotten it altogether, and recollected that your petitioner had failed to get the twelve thousand.

That your petitioner did inform said Graves by letter a short time before the sitting of the May term of said court in this cause, 1872, that your petitioner would attend said court, in said cause, early in the term; that your petitioner did come (as he supposed to be early in said term) to the city of Montgomery on the day of June, 1872, while this said court was still in session at said term, and brought about five thousand dollars of the said bank-notes—his own property—forwarded to him

from Richmond, Virginia, and immediately proceeded to the office of said Graves and Rhea to have said bank-notes filed in this cause; that said Graves thereupon informed this petitioner that said cause
263 was closed up by a final decree, consented to by all the attorneys, and that said cause was irrevocably closed.

Whereupon your petitioner claimed that (as orally admitted by said Graves in open court February 1st, 1872) said Graves knew, or that your petitioner thought he knew, of your petitioner owning said bank-notes; that he had notified him by letter of date of his intention to attend this court in this cause, and then and there requested said attorney to open, or attempt to open, said decree of June 11th, 1872, in this cause for the purpose of filing said bank-notes in said cause, but said Graves, after consulting with Messrs. Watts and Troy, as he then stated, refused to attempt to open said decree, and did advise your petitioner to let said decree stand, and did advise your petitioner to go to Selma to see the receiver and the defendant for
264 the purpose of making settlement of the balance of said bank-notes not filed.

Your petitioner did go to Selma to examine into the matter, as advised, but could get no settlement offered. Whereupon your petitioner immediately returned to the city of Montgomery, and found that said court had adjourned that day for the term. Whereupon the following notice was served upon Messrs. Sayre and Graves:

(Cause entitled and addressed.)

"Messrs. SAYRE AND GRAVES,
"*Attorneys for Plaintiff:*
"Messrs. WATTS AND TROY, *of Counsel:*

"GENTLEMEN: The decree of June 11th, 1872, having been taken in the above cause without my consent or information, and upon inspection I am dissatisfied with and opposed to it, I have asked your services to revoke said decree, which you declined to give; I therefore re-
265 spectfully ask that you will give me a power to substitute other counsel in the cause, and consider yourselves discharged in the cause, and much oblige,

"Most respectfully, yours, &c.,
"HARVEY TERRY, *Plaintiff.*"

Whereupon the following substitution was given, (cause entitled, &c.)

"To E. C. V. BLAKE, Esq're,
"*Clerk of said Court:*

"You will please withdraw our names as solicitors for the complainant in the above-stated cause, and as far as we are concerned you can substitute such person as Mr. Terry may desire, but without any liability resting upon us, and the above shall in no wise prejudice any claim for fees which we may have against the complainant in this cause.

(Signed) "W. H. GRAVES.
"WATTS & TROY,
"Per GRAVES."

266 And said withdrawal was duly filed of record in said cause June 27th, 1872; and also that said Graves did state to your petitioner that other parties who held bank-notes of said bank were apply-

ing continually, after the first day of the term, (date of notice time expired,) to have their bank-notes proved in said cause, which proof of notes and filing claim said solicitors opposed: that it was rumoured that there were other parties (Branch and Co. and others) holding large amounts of the bank-notes of said bank who might apply to have their bank-notes proved in said cause, and argued that the interests of your petitioner were benefited and preserved by consenting to and hurrying up said decree by shutting out all parties who had not proved their notes. Said solicitor, at that time, admitted that the bonds held by the receiver to be distributed amongst the creditors were of uncertain
267 validity and without fixed value; that the liability of the stockholders under the charter to pay the debts of the bank was good, uncollected, and ample to pay all creditors in full.

Your petitioner asks how he was benefited or expected to be benefited by barring all creditors of said bank, and why his attorneys should have inserted or allowed that objectionable feature put in said decree. Supposing said bonds in the hands of said receiver to eventually prove entirely worthless, what remedy would remain to petitioner and other creditors for such loss for debts already proved in the cause, under said decree?

Admitting, for sake of argument, that the omission to notify complainant of the appointment of a master in this his suit and of his
268 right to file further bills and claims in said cause was a mistake or oversight, what possible object could the complainant have to barr himself and all other creditors against any such mistake or error?

Admitting the solicitors of complainant received a liberal fee from their client, and a very large fee from the fund in the cause, and admitting that the omission to notify their client of the appointment of a master in the cause, or give information of his right to file claims in said cause, and the fact appearing to said solicitors that said client had further claims to file; that a great error had been committed against him; were not such solicitors, both legally, morally and equitably bound to rectify, or at least to attempt to rectify, any such mistake? Even if such decree was consented to, did not professional integrity require said solicitors to rectify such a mistake? Even if said decree was con-
269 sented to, why not re-open or annull a consent decree, if honestly made, when the fact appeared of error or mistake between them and their client, or for any just cause? Does not refusal to do so imply some secret bargain or obligation to defendant?

And therefore said answer is insufficient.

TROY.

In reply to the answer of D. S. Troy, esq., filed in this cause, and of his oral omission that he, said Troy, drew said consent decree of June 11th, 1872, in the interest of and for the benefit of petitioner, and did oppose the filing of other claims of creditors of said bank who applied, after the first day of said term of court, to prove such claims, and did defeat the filing of some such claims, proves conclusively that complainant's solicitors knew of other creditors holding
270 claims at the time of making such consent decree, which had the effect to shut out and barr your petitioner and many other creditors who own many thousands of dollars of notes of said bank that would have been filed in said cause had such creditors known of their right to do so, such answer filed does assert that, as solicitor in said cause, he opposed other creditors filing claims after the first day of

the term of said court, upon the ground of protecting the interests of your petitioner by so doing; but said answer does not aver or set up that any legal inquiry was ever made of the estate of said bank, nor does not claim to have exhausted all of the assets of said bank, nor to have exhausted all the funds and liabilities liable for the payment of the debts of said bank already proved in said cause, nor does not aver that all the property, trust-funds, and assets of said defend-
271 ant liable to pay the debts proved in this cause will be appropriated for the payment of such debts, nor to the payment of any other or further debts of said defendant not proved, nor have not averred that the claims proved in said cause will be paid at par. What conceivable interest could complainant have in consenting to and making such final decree barring all creditors, without himself being paid in full under said decree, while further collections could be made to a vast amount from a liability of five hundred thousand dollars set apart by law for the payment of *of* such debts?

Such plea is without reason, common sense, or common practice.

Said answer does set up that the notice given by the master for all creditors to prove their claims was the usual notice, but does not
272 deny the allegation in the petition that said corporation's promises to pay were scattered more or less throughout fifteen States, nor does not assert that said newspaper in which said notice was published had any wide or extended circulation.

Said answer does set up, "by the terms of said decree, all creditors who failed to prove their claims and to come in to share the expenses of the litigation as therein provided were excluded from participation of the results of the litigation." Your petitioner submits that said answer is not a correct answer nor an honest answer, but submits that said decree says: "It is further ordered, adjudged, and decreed that all creditors of and holders of the bills or notes issued by said Commercial Bank of Alabama who have not presented their claims and had them allowed by this court be, and they are hereby, forever barred and foreclosed from prosecuting their claims against the
273 said Commercial Bank of Alabama.

"It is further ordered, adjudged, and decreed that the said Commercial Bank of Alabama, its officers and stockholders, be, and they are hereby, forever discharged from any and all liability for or on account of any debt or demand of whatsomever nature now or heretofore subsisting against the said bank and officers and stockholders of the same."

What possible interest could the complainant have in making such a decree? Every line and word in the above quotation is in the interest of the defendant, and against this complainant and the creditors. Was any authority given to the solicitors by their client to make such a decree? It is not even pretended or claimed that your petitioner was ever consulted about such decree. If honestly made, with-
274 out obligation to or bargain with the defendant, why not re-open any consent decree, and this decree in particular? Did not the plaintiff pay his retainer and commissions on sum collected as agreed? Did not solicitors for complainant receive an enormous fee from the fund in the cause? Was such fee consented to willingly by the defendant; was such fee any stimulant to draw said decree with the quotation contained therein above quoted; was any argument ever made in the cause in court except the contest about fees? Petitioner holds a letter purporting to have been written by said D. S. Troy or the firm of Watts and Troy, as follows:

"OFFICE OF WATTS & TROY,
"ATTORNEYS & COUNSELLORS AT LAW,
"*Montgomery, Alabama, March* 21, 1873.

"Mr. E. H. PRINGLE,
"*Charleston, S. C.:*

275 "DEAR SIR: The Commercial Bank of Alabama has been wound up on a bill filed by Harvey Terry in the United States district court here, in which we were of counsel for Terry. Some of the bill-holders who failed to come in under this decree contemplate attempting to get rid of its effects in excluding them. We think the effort, if made, will fail; but we are not in a position to represent or advise them, and we suggest that your friend referred to in yours of 8th inst. correspond with Messrs. Stone and Clopton or Messrs. Sample and Cooke, of this city, who are competent and reliable attorneys, and have had no connection with the litigation. Terry himself held bills which he did not place in the hands of his attorneys nor inform them about, and which were excluded, and he is seeking to open the decree to get them in. Messrs. Branch Sons & Co., of Augusta, Georgia, were also
276 bill-holders to a large amount, and were also excluded, and desire to open the decree. So far as we can learn no counsel have been retained as yet in the matter, but Messrs Branch Sons & Co. have consulted Messrs. Sample and Cooke.

"Very respectfully,
(Signed) "WATTS & TROY."

Is the foregoing a true copy of a letter written by D. S. Troy, or written by the firm of Watts and Troy, to E. H. Pringle, esq., of Charleston, S. C., and is the contents of said letter true?

What reason exists why said firm cannot or should not take employment for fee and reward against said defendant? Is it not the usual business of said firm to take such employment? Have not said firm accepted such employment, and under the facts as developed in this cause has such employment been honestly, fairly, and entirely
277 concluded? Has the creditors for whom said firm acted been paid in money or its equivalent at par; or is it possible to pay said creditors in money at par under said decree? And what reason exists why said firm should decline or should have declined to have admitted all creditors of said bank to participate in said suit, and to have had the benefits thereof, and to have prosecuted said suit to a final termination, as set forth in the bill of complaint in said cause? Don't professional integrity require them to correct (or at least attempt to correct) an error, mistake, or omission of their client or of him for whom they act in a cause? Can they give any good or legal reason why they should not have done so in this cause?

And your petitioner submits said answer is wholly insufficient.

BROOKS.

In reply to the answer of W. M. Brooks, esq., your petitioner
278 says that he had no intention of making any charges or casting any reflections whatever on that gentleman, your petitioner being informed that Mr. Brooks had fought and strenuously opposed said consent decree, and humbly asks pardon of said gentleman for all vexation and trouble caused hereby. But in reply to said attorney why interest was not allowed on the claim of petitioner that protest made was not good, answers and says, although the protest may not have been

made in exact accordance of the requirements of the code of Alabama by writing on each bill, (that duty said code requires to be done by the defendant, which duty the defendant refused, and said refusal was noted,) and the presentation and demand was duly made, proven, and admitted, and such demand was sufficient to carry interest from that date.

279 Your petitioner submits said answer is not sufficient as to interest not being allowed.

PETTUS.

In reply to the answer of E. W. Pettus, esq're, of the firm of Pettus and Dawson, as counsel for the defendant, your petitioner says said answer does not deny that said decree was a consent decree, advised, assented to, and hastened by said consent, and made before the court had instructed the master in the cause to enquire into the estate of the defendant in the cause and report upon such estate, and before such inquiry was made, and before any inquiry was made whether the estate to be administered upon by said decree would pay a money value of par on the claims proved in said cause, or what amount in value would remain unpaid thereon, nor that said decree had the effect to

280 exclude petitioner and many other creditors who own many thousands of dollars of the bank-notes of said bank from filing further and other claims in said cause, nor that many creditors who own many thousands of dollars were excluded, nor that defendant knew or ought to have known that such creditors existed at the time of consenting to said decree, who, if they had known of their right to file said claims, would gladly have availed themselves of such right to do so, and who wish to do so now if allowed by the court, which said claims are now barred and rendered worthless by the action of this court, induced by the act of said defendant and by his failure to give said creditors such notice, nor that the fund in court is insufficient to pay par on the claims filed, nor that assets and liability of the stockholders under the charter to

281 pay all debts of the bank exists and remains uncollected and unapplied thereto, nor that said liability is not ample to pay all existing debts of said defendant, whether proved or not proved in said cause, nor that the defendant knew or had good reason to believe that Messrs. Branch Sons and Co. held many thousands of dollars of said bank-notes, as set forth in the affidavit of Thomas P. Branch, esq., filed as accompanying and part of this said petition; and said defendant refused or failed to give said Branch Sons & Co. notice of said right to file said bank-notes before making consent to decree barring all creditors, nor have not denied that by the terms of said decree "all outstanding claims against said bank and stockholders shall be barred and foreclosed," nor have not denied any other material allegation in said

282 petition, except that the notice published by the master for all creditors to prove their claims was sufficient notice to all creditors of said bank. Does said newspaper, the Montgomery Mail and Advertiser, have circulation in fifteen States? Does said newspaper have any general circulation even in Alabama? I say no. What is the custom of courts administering on the estate of great corporations having wide-spread liabilities? Is it not to give wide-spread and thorough notice to creditors? Even the complainant in the cause was ignorant of it, and proofs in the cause are referred to with confidence to establish insufficiency of information to creditors.

Said answer does set up two immeterial points which your petitioner

emphatically denies, namely, that your petitioner did not own said five thousand dollars of bank-notes when this suit was brought, and
283 the charge that your petitioner is a common speculator in suits against broken banks, to which charges your petitioner replies that he did own said bank-notes long before said suit was brought, the same being deposited in bank with other bills, in Richmond, Virginia, and that your petitioner has obtained the affidavit of the person in whose custody said bills remained to prove that fact; that he forwarded the same from Richmond to your petitioner avowedly for the purpose stated, to wit, to file in said cause.

And, as your petitioner understands it, if a suit in equity means anything, it means that all creditors shall have full and ample opportunities to prove all their debts, and to get paid from any uncollected fund that is collectable, and that said answer is insufficient.

284 As to the latter charge, your petitioner says that he owns many thousands of dollars of both notes and claims against the old broken banks of the country, as the remnants of his former business, his own property, honestly acquired, and he does not regard disparaging insinuations, unjust abuse, nor calling hard names as a legitimate payment of any honestly acquired claim, but rather as adding insult to injury, and most respectfully submits that the answer of said defendant is wholly insufficient.

COMPTON.

In reply to the affidavit of Jordan C. Compton, esq., who is the receiver in the above-stated cause, and filed on behalf of said defendant, your petitioner says said affidavit is true in so far as to your petitioner receiving about eleven hundred and eighteen dollars in cash on
285 account of the fund in court in this cause, and refused to receive certain bonds held by said receiver and offered to your petitioner as payment of his claim against said bank. It is also true, as stated in said affidavit, that your petitioner held a further large amount of bank-notes of said bank at that time, and refused to acquiesce in said decree on that ground, and also upon the ground that said bonds were of doubtful validity and of uncertain value, and might be worthless; that petitioner denied the right of any court to decree compulsory payment of a debt in full, except such payment be made in cash, and asked what redress plaintiff would have if he accepted said bonds, if such bonds should prove to be worthless. Said Compton also neglected to state that he told your petitioner on that occasion that said decree was a consent decree, induced or effected because other creditors had applied since the first day of said term
286 (the time limited in the notice given by master) to have their claims proved and allowed in said cause; that it was rumoured that other creditors with large amounts of bills were expected to apply to prove their claims; that your petitioner was expected daily to be in 'tendance at said court, and that he probably had more bills to prove in said cause; that he knew that Branch Sons and Co. held a large amount of bills of said bank, and that Branch was shut out and barred by said decree; that it would be a long, hard road to collect the liability against the stockholders, although good and collectable, and in his opinion your petitioner would never live to do it, and argued strongly with your petitioner to induce him to take and accept said bonds as full settlement of his claim.

Said Compton did state orally to this court, on the 1st day of
287 February, 1873, at the partial hearing of said petition, that he as receiver had taken possession of and converted to the use of the

above-stated cause all of the assets of the said Commercial Bank that he had any knowledge of. Your petitioner submits that the statute liability of the stockholders of said bank as particularly and peculiarly set out in the charter of said bank, as follows: Section 21 of the statutes of the State of Alabama, 1856, page 238, chartering the Commercial Bank of Alabama, reads:

"Be it further enacted, That in case the said bank be found insolvent, and settlement of its affairs be ordered as herein provided, the same shall be done upon bill filed in said chancery court under the orders of the court and rules of chancery, and full distribution shall be made of the assets according to the rights of the parties; but the holders of
288 bank-notes and obligations issued by the bank for circulation as money shall be first called in and paid, and shall have priority over debts due from the bank; and after the assets of the bank are exhausted, if they be not sufficient to pay all debts and liabilities, a further call shall be made on the shareholders in the bank for a further payment of capital over and above the sum of one hundred dollars, of an amount equal to the deficiency which shall be apportioned among all the shares of stock, as well of the individual stockholders as of the State, and an order shall be made by the court for the payment of each shareholder of the sum or proportion due on his shares of stock, and each shareholder shall pay the sum so assessed to him severally in proportion to his stock, which shall be collected by the receiver and applied."

Your petitioner therefore insists that said statute liability against
289 the stockholders of said Commercial Bank is an asset or security made by statute due to the creditors of said Commercial Bank of Alabama upon the insolvency of said bank, and that Jordan C. Compton, receiver, had due notice and full cognizance of the things hereinbefore set forth, and that therefore said affidavit is untrue in those things controverted, in both references and in facts as herein set forth, and such affidavit is therefore both incorrect and insufficient.

To Hon. W. B. Woods, presiding judge:

Your petitioner submits to the consideration of this honorable court the following propositions:

1st. That said decree of June 11th, 1872, was a premature decree, and therefore error in the cause, in that no direction was given by the
290 court to the master in the cause to inquire into and take an account of the assets, money, securities, trust-funds, collaterals, and estate of said defendant liable to the creditors of said bank for the payment of the debts proved in the cause; that no such account of said estate was made by the master, nor any accounting had to ascertain whether the fund in the hands of the receiver in this cause constituted all of the estate of the defendant liable to pay said debts, or whether such fund would pay par thereon, or what part thereof would remain unpaid after administering said fund; that such direction should have been given by the court to said master; that such inquiries should have been made and reports had thereof before making decree of June 11th, 1872.

See duties of master, 2 Abbot, U. S. P. 358, No. 77; see Rule
291 73, U. S. Sup. Court; 1 Abbot, " " 145; see 18 Howard U. S. Reports, 199, Craighead vs. Wilson; see 5 Wheaton, U. S., 313, Marshall vs. Beverly; see 5 Wheaton, U. S., 424, Cook vs. Penn; see form of final decree, 2 Abbot's U. S. Pract., Pa., 359, No. 79, final decree.

2nd. That said decree was premature, and therefore error in the cause, by being made before the assets in the hands of said receiver were converted into cash and examination had if such assets would pay par on the debts proved, and because said decree was made a final decree without such ascertainment, while only a small part of such assets were in cash, and a large part of such assets consisted of debts and securities of doubtful validity and uncertain, which might have become worthless, thus leaving said creditors remediless while said decree remains in force as final.

292 2 Black U. S. Rep., 539, Ogilvie vs. Knox; see report of receiver in the cause, filed Dec'r 23rd, 1873; see form 79, final decree, 2 Abbot U. S. Ct. Prac., 359.

3rd. Premature decree, because made as a final decree, barring all creditors of said bank, (and error in the cause because made,) before sufficient notice was given for all creditors to prove their claims in said cause, and because said decree was so made before the master was directed by the court or had made inquiry whether all of the estate of said bank would or could be administered on under such decree. See order appointing master; see proofs in the cause; see report of Commercial Bank, official, made Oct. 15, 1864; see charter of Commercial Bank, State Statutes, 1855, p. 238; see 37 Alabama, 543, Watts vs. Watts' Legatees; Barton's suit, in equity, pages 153 and 201, 37 Alabama, 543.

293 4th. That your petitioner and other creditors in said cause in like condition, and represented by complainant, whose claims have been proved and allowed, amount to more than seven thousand dollars, only 36 per cent. of which sum has been paid on said claims, leaving 64 per cent., or more than $4,500.00, unpaid and due thereon, without assets in said cause to pay the same, as shown by the report of receiver filed in this cause December 23rd, 1873.

And your petitioner submits that no available process can issue from any court, nor be had in this cause, so long as said decree of June 11th, 1872, is allowed to be in full force; and submits that if said decree be allowed to remain a final decree in said cause, then your petitioner and other creditors are remediless in the premises to even have

294 their rights passed upon by any judicial tribunal, and utterly without redress, and therefore ask that relief may be granted. 9 Wallace, 175, in matters of Howard; 18 Howard, 201, Craighead vs. Wilson; 2 Black, 539, Ogilvie vs. Knox; 2 do., 457, Trustees vs. Beers; 16 Howard, 82, Fourniquet vs. Perkins; 9 Wallace, 369, Jones vs. Bolles; 15 Peters U. S., 287, Young vs. Smith; Adams' Equity, page 409, sec. 170, and 411, sec. 176; 1st Story's Equity, sec. 115. Equity corrects mistake. 1 Barbour, N. Y., 75, Hyde vs. Tanner.

And such power is also invoked to hear and save such rights not yet ascertained. Also, 46 Alabama Rep'ts, 496, Petty vs. Britt's Legatees.

5th. That said decree of June 11, 1872, is an impossible decree of complete execution; but said decree having determined the rights of the parties thereto to payment of the claims proved in the

295 cause, said decree is in effect and should be considered an interlocutory decree, giving the rights of creditors of defendant to payment of their said claims; and while the right was established under said decree, no sufficient remedy was given by said decree to effect the payment of such debts proved, and no ascertainment was had by the court before making such decree whether any further assets, fund, or estate existed liable to pay said debts proved, nor whether the fund then in hands of the receiver would pay said debts in full, nor what

part of said debts would remain unpaid after the application of the fund then in court, upon which an execution might issue on further proceedings had to compel payment of such balance due;
296 and further, that it was impossible for said receiver to divide up and distribute said fund and assets as directed in said decree, (see report of receiver filed December 23rd, 1873,) and therefore fatal errors in the cause of making said decree final. Your petitioner submits the further fact that said receiver did apply to this court in this cause at its fall term, 1872, for an order to sell the assets, bonds, &c., then remaining in his hands undivided and undisposed of at that date, and that said receiver has found it impossible to sell such bonds and assets, and so stated in report in this cause filed December 23rd, 1873, although twice ordered to make sale thereof; and submits it therefore could not be a final decree and only an interlocutory decree. See form 79 final decree, 2 Abbott U. S. Ct. Pract. 359; see 6 Howard
297 209, Pulliam vs. Christian; 18 Howard 201, Craighead vs. Wilson; 2 Abbot U. S. Ct. Pract., 223; 37 Alabama 543, Watts vs. Watts; see 2 Wallace 440, Rail R. Co. vs. Soutter; see 19 Howard, 287, Beebe vs. Russel; 2 Daniels Chancery Pleading, 1501-2.

6th. Your petitioner submits said decree to be a badge of fraud upon its face, in that by its positive terms, by dividing the assets then in hand, (before legally ascertaining whether all of the estate, liabilities, securities, and effects of said defendant liable to pay the debts in said cause could be or would be duly administered on in said suit, or whether said debts in said suit would be fully paid, or what part remain unpaid,) and did fully discharge said defendant and the stockholders thereof from paying any other or further part of said debts proved in this cause
298 that might remain unpaid or be found to be due thereon, and also barring all debts and demands due by said defendant or due by the stockholders thereof for bills or notes issued by said Commercial Bank from ever being sued or prosecuted thereon by this complainant, or by any and all other persons holding the same not before the court in this cause, thus covering up, concealing, and discharging from the liability to pay debts the property of stockholders and statute liability of stockholders of said Commercial Bank to the amount of five hundred thousand dollars. See certified copy of return made by said bank Oct. 15th, 1864, to auditor of State of Alabama, copy filed in this cause May 29th, 1873.

Bump on Fraudulent Conveyances, pages 76 and 77; Kerr on Fraud and Mistake, page 293.

299 7th. Your petitioner submits that said decree is an actual fraud upon him personally in this cause and upon his rights to other and further claim against said defendant, and is also a fraud upon the rights of Benjamin F. Noble, a party to said suit but not represented by counsel in said cause, and all other parties to said suit in like condition, in that by the terms of said decree right is given your petitioner to have and collect three thousand and ninety-three dollars, while the remedy given by said decree to collect said debt only extended to the sum of eleven hundred and eighteen dollars, while if said decree is allowed to be and remain a final decree without further proceedings, then your petitioner is barred of his right (ascertained under
300 said decree) of the collection of about nineteen hundred dollars due to him and unpaid to this date; and that your petitioner and B. F. Noble, parties to said suit, are barred by said decree from filing further claims in this cause, and from bringing suit in any other court for the collection of claims held at the date of the making of said de-

cree, much larger in amount than the claims herein filed and omitted, only through mistake and want of information of the right to file said claims, amounting to about six thousand dollars; and all other creditors of said defendant not parties to the suit are barred or sought to be barred by said decree, while a vast amount of assets, trust-funds, or statute liabilities, good and collectable, remain outstanding, uncollected,
and not administered upon by any court for the payment of the
301 debts of said defendant; and if in the administration of justice courts of equity are established to protect the property and save the just rights of parties legally ascertained, then that power is invoked in this cause.

Adams' Equity, page 396; see 2 Abbot's Nat. Digest, 559, §14; *176; page 419*, 189; page 191; see charter of Commercial Bank; see copy of return of said bank to State auditor, Oct. 15, 1864, filed in this cause; see affidavits of B. F. Noble and complainant filing petition; see return of receiver filed Dec'r 23rd, 1873, and return of receiver filed June, 1872; see master's report of June, 1872; Wheeler's Equity, page 452, sec. 6; 443, sec. 18.

8th. Your petitioner submits that said decree was a consent decree, united in by the attorneys of complainant and the attorneys of
302 defendant, as heretofore admitted in the pleadings, whereby it was bargained and agreed, or consented, to divide up all of the property and assets of the defendant then in the hands of the court (consisting of bonds, securities, notes, and cash) amongst themselves, Graves and Rhea, and Watts and Troy, and the creditors of said bank; that said bargain or consent decree was made by the solicitors of complainant without the authority, knowledge, or consent of complainant, contrary to his instructions and interests, and in fraud of his rights in the cause, in that said decree was worded and intended to be a final decree, barring all further proceedings in collection of assets or securities or statute liabilities of the defendant, or those liable to pay the claims
proved in said cause, without legally ascertaining whether such
303 fund and assets would pay par on the claims proved in the cause, and without first ascertaining if the bonds, notes, &c., were of any value, and if of any, of what value; and if such fund and assets would not pay par, then how much and what part of the claim of petitioner would remain unpaid; and that said solicitors bargained and consented to said decree without first informing said petitioner that said cause had progressed to taking proof of claims, and that his amount in their hands for proof was far below the amount stated in his complaint, and asking his correction of it, or explanation if he had other or further proof of claim to make, and asking his authority to make such
consent decree before drawing or consenting thereto, especially as
304 said complainant was expected daily to be in attendance at said court.

That said decree was a very unusual decree, by its terms open to suspicion of fraud, in that by its terms it barred all creditors of said bank (whether parties before the court in said cause or otherwise) from prosecuting or maintaining any suit against said bank, its officers or stockholders, thereafter; that said bonds sought to be divided up and paid to complainant and eighteen other creditors are refused by complainant and others, and said bonds are believed to be unsaleable and of little or no value, and complainant denies the right and authority of said solicitors to make any bargain or consent decree distributing bonds or assets other than money in payment of his or their said claim proved, or to make any bargain or consent decree with said defendant barring

305 all claims due to petitioner and all other creditors before the court in said cause, and also barring all other creditors of said defendant not before the court in said cause, and especially so when said decree is so bargained and consented to before legal enquiry is made; that all of the estate and securities of said defendant liable to pay such debts has been administered on and exhausted, and therefore he asks relief.

See Abbot's Nat. Digest, pa. 559,
§ 14. ☞ It is a fraud for an agent, &c. 1 Russ & Mylne, 53; 11 Bligh, 397, 418.
41 Alabama Reports, 103; Chapman et al. vs. Cowles.
Shearman & Redfield on Negligence, page 267, § 224; do., page 258, § 214.
See order appointing master, &c.
See report of receiver filed December 23d, 1873.
3 Stewart's Alab. Repts., 23, Gullet vs. Lewis.
3 J. J. Marshall Ky. Repts., 532. Given vs. Briscoe.
306 3 Mason U. S. Repts., 420. Williams vs. Reed.
4 Dessaussure Repts., 44. Tankerly vs. Anderson.
6 Wallace Repts., 157. Savory vs. Syphor.
4 Washington, 503. Mayor vs. Folkrod.
294–4. ☞ Kerr on Fraud and Mistake, page 163, 171, 172, 182, 183, and 214.
7 Georgia Repts., pa. 104. Cox vs. Sullivan.
4 Johnson's Chan. Repts., 121. Howell vs. Baker.
30 Maine, 431. Bunker vs. Miles.
13 Louisiana Repts., 18. Meeker vs. York.
41 Alabama Repts., 103. Chapman et als. vs. Cowles.
18 Wendell N. Y., 375. Van Wyk vs. Seward.
5 Randolph, Va., 639. Smock vs. Dade.
Story's Equity, 212, § 186.

Your petitioner submits that said decree determined the rights of the claimants making proof under it to judgment for payment
307 of said claims, but owing to error in the cause no remedy to complete such judgment or compel such payment was given; and your petitioner submits that payment cannot be had under said decree of the claims proved in the cause, and no amount has been ascertained by the court of what balance remains due and unpaid upon which an execution might issue or rule nisi issue, as contemplated in the act chartering said bank, nor has any sum been found to be due upon which an appeal would lie to the United States Supreme Court, while there is yet a sum of money and assets remaining in the hands of said receiver undisposed of; and therefore said decree should be considered interlocutory, and relief granted, and further proceedings allowed in
308 said cause.

Charter, Acts of Alabama, 1855–6, page 238; 2 Abbot U. S. Ct. Pract., page 224; 15 Peters, 287, Young vs. Smith; 2 Black U. S., 539, Ogilvie vs. Knox; 18 Howard U. S., 199, Craighead vs. Wilson.

Your petitioner submits that it is not nor was not any part of the duties of the receiver in this cause to determine either the law or the facts in said cause, whereby the legal rights and status of the several claimants therein are sought to be changed thereby, without the special power and authority and direction of the said court to make such

inquiries and to report thereon. See Duties of Receivers, Abbot U. S. Pract.

Your petitioner submits that the facts are, and that the papers show, that he has used due diligence in seeking and pressing his rem-
309 edy in this cause; that he discharged the solicitors acting for him in said cause, and filed a withdrawal and power of substitution within 5 days from the time he knew of the making of said decree; that he filed exceptions to the master's report in the cause within the time required by rule of court; that he filed a petition to re-open said cause, and for further proceedings therein at the ensuing term of court, and pressed the same with vigor, but, owing to adverse circumstances of delay, removal of cause by act of Congress, &c., he has not been able to get a final hearing on said petition, with the amendment thereto with evidence in the cause, but relying on the justice of his cause and the facts herein and therein stated that relief will be granted.

310 May it please the court, we stand and rely upon the fact that under said decree creditors who have proved their claims in said cause to the amount of seven thousand and fifty-three ($7,053) dollars have only received 36 per cent. on their claims proved, and that there yet remains 64 per cent. due and unpaid thereon, and under said decree no further proceedings can be had to enforce any further collections of assets or liabilities due to said creditors from said bank or its stockholders, and that liabilities of stockholders do exist to the amount of five hundred thousand dollars, as shown by report of bank, copy of which report filed herewith, a large share of whom are solvent.

See copy of report of bank, dated October 15th, 1864, copy filed herewith.

311 We stand and rely upon the fact that the laws of justice, honesty, and equity will not force a worthless bond or security upon a creditor in lieu of money in payment of his debt, although the attorney at law, without the authority of his client, may have bargained with the defendant to do so, and where such creditor is not nor was not represented by attorney to said consent-decree, the wrong done such creditor was of greater degree, and your petitioner does represent, by power of attorney, in fact a part of such unpaid claims in that condition, and by virtue of his bill in this cause, he believes all of the remaining creditors to the claims proved unpaid. 5 Randolph, Va., 639; Smock vs. Dade.

312 We stand and rely upon the fact that Benjamin F. Noble, esq., a creditor of said bank, who filed bills to the amount of $905.00, and not represented by attorney, and was not a party to said consent-decree, omitted (by mistake) to file other bills of said bank in said cause, held and owned by him at that time, to the amount of $950.00, which bills are now barred out by said decree, and such creditor remains without relief.

See affidavit filed of Benjamin F. Noble.

We stand upon the fact that such decree was an unjust and unrighteous decree, incapable of performance, and intended to defeat the rights of absent parties not before the court, and only partially protecting the rights of those parties in court; not final in its effects, because,
313 giving a right without a complete remedy; full payment could not be had under it, nor can any amount be found due under said decree upon which an execution could issue, nor was any stated sum found due from which an appeal would lie, yet professing, on its face,

to be a final decree; and submit that said decree must be considered interlocutory only.

We stand upon the fact that the solicitors of complainant knew of the existence of other creditors at the time of making said consent-decree, as admitted in the pleadings, and that said defendant did know, and was bound to know, that other creditors existed beyond those then before the court in said cause, and that said creditors wanted to file their claims in said cause, if given the information and opportunity to
314 do so, yet, in violation of right and justice, made and are trying to maintain said consent-decree as a final decree.

We stand upon the fact that the solicitors for the complainant in this cause received out of the fund as fees for services in the cause the enormous sum of three thousand five hundred dollars of the cash assets by consent of said defendant, without regard to the rights of creditors in said cause, while the fact is, and the papers show, that no contest was had nor argument made except the contest of said attorneys before the master about fees, and that said $3,500 was in addition to the agreed compensation made with complainant; and while the bill of com-
315 plaint sets out as due complainant $20,000, said solicitors only filed about three thousand dollars of such bank-notes in the cause, and did not call upon the plaintiff to make up such deficiency, nor did not give him information of the appointment of a master, or of his existing rights to appear and file such claims or further claims in said cause; that complainant was a non-resident of the State of Alabama and the district for which said court was held, and submits that it was the duty of such attorney to have given such notice to this complainant, and when, by such failure to give notice, the fact appeared that complainant held and owned a further large amount of such bank-notes not in proof in said cause, it was the professional obligation and solemn duty
316 of said solicitors to have given their services to correct said mistake by attempting to open or annul said consent-decree, and have said notes proved in the cause.

Kerr on Frauds and Mistake, page 163; 1 Munford, Va., 557; Whitehorn vs. Hines; 2 Harris & Johnson, Md., 292; Broyden vs. Walker.

We stand upon the fact, the complainant and eighteen other creditors, parties to said bill, and not represented by counsel; that the whole amount of said claims remaining unpaid are centered in and represented by this complainant, by virtue of his bill; and therefore this court is bound to take cognizance of & grant relief to the whole interest in the cause represented by petitioner, remaining unpaid, and the equities of law and the practice of courts require that the debts of a defendant
317 must be paid when assets or securities exist liable therefor, which are sufficient thereto, and the rules of equity will not allow an absent creditor to be defeated of his rights and remedies given in a bill in chancery, who applies to said court for relief, while there remains in court a fund in said cause undistributed. (2 Black, U. S. Repts., 539; Ogilvie vs. Knox. See proofs made in this cause.)

We stand upon the fact that the complainant has realized only about $850 on the $3,093 of bank-bills proved in the cause, (after deducting fees paid to solicitors,) while the solicitors in the cause have received fees in cash ($3,768) three thousand seven hundred and sixty-eight dollars, without making an argument, and claim additional fees, when
318 by their bargain with complainant they are entitled to two hundred and sixty-eight ($268) dollars, which sum has been fully paid; and they refused and still refuse their services to complainant for relief, while such services was due to complainant to the termination of

the cause. (Kerr on Fraud and Mistake, 163; Shearman & Redfield on Negligence, 268, § 227; 2 Daniels' Chancery Pleading, page 1432. Solicitors not allowed prof. charges from the fund.)

Your petitioner submits that the allegations set out in his petition, and set forth and confirmed in the affidavit of Thomas P. Branch, esq., filed in this cause as a part of said petition, has not been met nor denied, either oral or written, by any answer made in the cause, in that the defendant, at the time of consenting to said decree, knew or
319 had good reason to believe that Branch Sons and Co. held and many other creditors held large amounts of said bank-notes, who would gladly have availed themselves of the right to file such notes as claims in said cause, if they had known of their right to do so; nor has the allegation been denied that said decree was a consent-decree, prematurely taken, which had the effect to defeat the objects of this suit, namely, the collection of all of the assets, effects, collaterals, and trust-funds belonging to said bank or liable for its debts, or at least sufficient thereof to pay all of the debts of said corporation; nor the allegation has not been met nor denied that the complainant in said cause, and many other creditors, were not informed and did not know that a master had been appointed in said cause,
320 to take proof of the debts due by said bank defendant in this cause, nor that complainant and many other creditors did not have information of their rights to file claims in said cause, and were thus shut out and barred by the effects of said consent-decree, which action your petitioner submits to be a fraud upon his rights and the rights of all parties who have proved their claims in this cause, and remain in part unpaid, namely: John Hardy, E. G. Fowler, W. A. Ransom & Co., N. M. Hyatt, W. F. Hatchett, W. J. Bibb, A. W. House, J. C. Bennett, Jacob F. Terry, E. D. Willett, E. Beebe & Co., Geo. P. White, J. D. Huston, R. L. Logan, W. A. Cochrane, Brooks W. Young, Jas. M. Moore, H. R. Edwards, and Benjamin F. Noble, in particular, and a fraud upon the rights, or
321 attempted fraud upon the rights, of all persons holding bank-bills of said Commercial Bank of Alabama, at the time of making said consent-decree of June 11th, 1872, who had no knowledge or information that said decree was to be made, no' had no information of their rights to file said bank-bills as claims of debt against said defendant in this cause, to be paid under said decree, because "all persons" are barred (by the terms of said decree) from prosecuting their claims against said Commercial Bank of Alabama, and decreed that the said Commercial Bank of Alabama, its officers and stockholders, be, and they are hereby, forever discharged from any and all liability for or on account of any debt or demand of whatsoever nature now or heretofore subsist-
322 ing against the bank and officers or stockholders of the same, while a trust-fund or statute liability (made sacred by law) of five hundred thousand dollars remains outstanding and uncollected and unappropriated to the payment of such debts of said defendant. (See charter of bank. See report of bank, made Oct. 15th, 1864. Copy filed in this cause. See proofs in this cause.)

Your petitioner submits that no denial has been made of the fact that the legal liabilities does or did exist against such stockholders to pay such debts, nor have not denied that such fund is ample to pay such debts, nor have not denied that such fund is outstanding, uncollected, and unappropriated to the payment of such debts, before consenting to and making said decree of June 11th, 1872, and have not denied
323 that many thousands of dollars of such claims were barred, or at-

tempted to be barred, thereby; nor have not denied that the solicitors for the plaintiff and solicitors of defendant both knew or had good reason to believe, at the time of making such consent-decree, that many creditors existed holding many thousands of dollars of such bank-notes and claims not proved in this cause nor not provided for, and barred by said decree, and would be rendered worthless thereby. (2 Black, 539; Ogilvie vs. Knox.)

And your petitioner submits, for further error in the cause, that the bank-notes of your petitioner were duly presented for payment on the 3rd day of June, 1871, and demand made thereon for the pay-
324 ment thereof; the sufficiency of the protest (under the State statute) requiring the fact of presentation and refusal of payment to be written on each bill, has been plead; but your petitioner submits that the demand of such bank-notes was sufficient to carry interest, and submits that such demand has been duly proven and admitted.

3 Mason, U. S., 1, Suffolk R. R. vs. Lincoln.

24 Illinois Rep'ts, 433, Reapers' B'k vs. Willard.

Brightley's U. S. Digest, page 68, § 48.

Code of Alabama, page 302, sec. 1174.

Your petitioner submits that of all the answers filed in this cause in reply to petition dated January 30th, 1873, only one answer (Wm. M. Brooks, esq., who is honorably excepted) denies consenting to said decree. The solicitors for the plaintiff (one admitted in court orally
325 that he drew said decree) admit the consent to said decree upon the ground of intention to protect and benefit the interests of complainants, which intention, your petitioner submits, was a mistake or fraud, a grand mistake on the part of said solicitors, (but for argument accept the plea as being true;) then why not proceed to correct such mistake so soon as discovered to be made in error against their client? Was the fact of consenting to said decree, if honestly done, any bar or reason for refusing to correct such mistake when discovered, or so soon as discovered? Was not the fact of barring your petitioner with five thousand dollars of such bank-notes in his hands, and exhibiting the same to said solicitors, sufficient notice of such mistake, particu-
326 larly when such consent was given, and said decree made without the authority or knowledge of your petitioner, and against his interests? Is the fact of making a consent to such decree a valid reason for refusing to correct a mistake made in it so soon as discovered? Did not solicitors receive a liberal fee from complainant, and an enormous fee from the fund in the cause, and would not and ought not the instincts of gratitude, professional reputation an' honor, and the sacredness of an oath taken at and before admission to this court, as a member thereof, to have been sufficient and binding on such solicitors to have given their services to correct such mistake, unless bound by some other consideration than serving the interests of their client? What interest had
327 complainant in making such decree a final decree, barring all creditors? None.

What interest had complainant in making such decree final before ascertaining what part of the debts proved in the cause would be paid by the assets in hand? None.

Would the complainant himself in person have consented to such a decree? No, sir.

Was it the bounden duty of solicitors of complainant to have had his authority to make such a decree before he could be bound by it? Such authority they did not have, nor do not claim to have had.

What interest had the defendant to bargain and consent to such de-

cree? Such interest is shown by the proofs in the cause to be more than twenty thousand dollars, and by the proof of such other and
328 further debts as may be shown, if this honorable court grants relief so to do.

What interest had the solicitors for complainant to unite with solicitors of defendant to consent to and make such decree? A fee of three thousand five hundred dollars, as admitted to have been received under it; and for the reasons why the defendant consented to such fee, your petitioner refers to the affidavits of Wm. A. Branch, Thomas P. Branch, and letter of Watts & Troy, filed herein, together with the attending circumstances in the cause, for this court to determine the real and true cause and object in making said decree. Kerr on Fraud & Mistake, 162.

Your petitioner submits that the argument of solicitors for complainant, that had petitioner accepted the bonds offered him by the
329 receiver, he would have received over ninety cents on the dollar of his claim, is false in theory and untrue in fact, as shown by the report of said receiver, filed December 23rd, 1873, in this cause, showing said bonds to be unsaleable and probably of little or no value, and submits that seventy-five per cent. cannot be obtained for such bonds, and that such bonds are not a good payment.

5 Randolph, Va., 639; Smock vs. Dade, 41 Alabama Rep'ts, 103 *a* 113, Chapman et al. vs. Cowles; Brightley's Fed. Digest, page 320, § 1031. Decree is to be construed as to the issue.

Your petitioner submits that on the 3rd day of February, 1872, your petitioner applied at the office of Pettus & Dawson, in the city of Selma, as the solicitors of said defendant, for some payment or settle-
330 ment of the claim of your petitioner, and to which application Mr. Dawson replied, on behalf of the defendant, that Mr. Pettus was busy, but that he was his partner, and would answer for him; that the defendant had no compromises to offer or settlements to make, and that they were satisfied with the matter in this stated cause in the way it stands now; and your petitioner hereby submits this last act of repudiation to said defendant to this honorable court for correction and relief.

Your petitioner submits that the only material proposition, as set forth in said petition as amended, is the fact of the insufficiency of the notice published by the master to call in all creditors in this cause; and your petitioner most respectfully submits that question, with his proofs and the facts in the cause, that there are numerous creditors hold-
331 ing large amounts of said bank-bills, and submits the further fact that in Georgia and Virginia, in causes of like magnitude and importance, such notice to creditors have not only been extended months but years, and published not only in one but in from three to six newspapers, giving such notices as the magnitude of each cause seemed to demand.

Your petitioner submits that exceptions to the master's report in this cause, dated May 30th, 1872, were duly filed in said cause on the twenty-eighth day of June, 1872, less than thirty days after the said report so filed, and that such exceptions remain of file and unargued and not disposed of until this date, to the best of the knowledge and belief of your petitioner.

332 Finally, your petitioner considers it eminently proper, and hereby submits this most extraordinary cause in all its parts, facts, and circumstances, to this honorable court, to consider if such decree be a usual decree and a just decree in all its parts and effects, and if it is a legal decree without error in the cause and according to

the rules of equity and good conscience, dealing out justice to all of the creditors of said defendant, compared and judged by all the proofs made in the cause, and made in support of said petition. If that be so, then your petitioner should be turned out of court and made to pay the costs in the cause; but if this court finds said decree to be an illegal, unjust, or fraudulent decree, or that error has been committed in the cause, then this honorable court ought to find who drew said decree and consented to present such decree to this honorable court for confirmation. Were the solicitors to said consent highly distinguished and intelligent
333 members of this court, from whom said court had a right to expect intelligent action and true legal knowledge, and, if any wrong has been committed, who committed such wrong; and if such wrong-doing was intentional or done by mistake, what motives prompted consent to said decree; and what motives actuated the refusal of services of said solicitors to open or attempt to open said decree; and what action, if any, is necessary by this court to vindicate the honor of this said court, and to preserve in purity the fountains of justice—that great keystone of safety to the lives, liberty, and property of the people, and what action shall be taken in regard to said petition, and that relief may be granted.

HARVEY TERRY,
Petitioner, per se.

Subscribed and sworn to before me this 22d day of April, A. D. 1874.
N. W. TRIMBLE, *Clerk, &c.*

Replicating to answers of defence and in support of petition,
334 also refers the court to pertinent cases:

1 Dessaussure, S. C. Repts., 173, Postell vs. Postell.
2 do. S. C. Repts., 34, Brailford vs. H.
2 do. S. C. Repts., 239, Rumsay vs. Deas.
2 do. S. C. Repts., 412, Rutlege vs. Green.
2 do. S. C. Repts., 507, Webb vs. Bellinger.
Richardson's S. C. Equity Cases, 469, Tanerett vs. Radford.
2 Hill, S. Carolina, 53.
2 do. S. Carolina, 152.
37 Alabama Reports, 543, Watts vs. Watts, legatees.
11 Wheaton, 103, Harding vs. Handy.

Filed in open court, April 22nd, 1874.

N. W. TRIMBLE, *Clerk.*

335 *Order of court denying petition, 23 April, '74*

Circuit court of the United States for the 5th judicial circuit and southern district of Alabama. [April term, A. D. 1874.

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THURSDAY MORNING,
April 23rd, A. D. 1874.

Court met pursuant to adjournment. Present, honorable William B. Woods, judge, presiding.

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HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity.

This day comes the complainant in his own proper person, and petitions the court to re-open the decree heretofore rendered in this cause, in the district court of the United States for the middle district of Alabama; and also comes the defendant, by counsel; and argument being heard, and the court being fully informed in the premises, and having duly considered said petition:

It is ordered and decreed that said petition be denied, and that
336 petitioner, Harvey Terry, pay the cost of this proceeding, this day taxed at five dollars, for which execution may issue.

(S'gn'd) W. B. WOODS, *Judge.*

337 In the circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } Appeal.

Harvey Terry, the complainant in the above-stated cause, hereby gives notice that he will move in this cause for a severance of parties to the appeal in said cause, granted on the 25th day of April, 1874; that he will move the following-named parties to the bill in said cause, for reasons to be shown to the court, be severed from said appeal: John B. Manning, State of Alabama, Edward Eikleheimer, Alexander Woods, Thomas K. Ferguson, Nathaniel Lane, B. Edward Grey, John McNabb, William White, J. K. Huber, J. C. Compton, W. S. Mudd, E. G. Fowler, Wm. F. Hatchett, Wm. H. Graves, W. I. Bibb, S. W. House, J. C. Bonner, J. F. Terrill, E. D. Willett, E. Beebe & Co.; that said motion of severance will be made on Thursday, June 18th, 1874, or so soon thereafter as the same may be heard by the court.

Mobile, June 17th, 1874.

HARVEY TERRY,
Complainant, per se.

338 To John B. Manning, State of Alabama, E. Eickleheimer, Alex'r Woods, Thos. K. Ferguson, Nathaniel Lane, B. Edwards Grey, J. McNabb, Wm. White, J. H. Huber, J. C. Compton, W. S. Mudd, E. G. Fowler, W. F. Hatchett, W. H. Graves, W. I. Bibb, S. W. House, J. C. Bonner, J. F. Terry or Terrill, E. D. Willett, E. Beebe & Co., and W. H. Graves and Watts & Troy, solicitors.

THURSDAY MORNING, *June 18th*, 1874.

Court met pursuant to adjournment. Present, the honorable William B. Woods, judge, presiding.

HARVEY TERRY
vs.
COMMERCIAL BANK OF ALABAMA. } In equity.

On motion of Harvey Terry, appellant in the above-stated cause, for a severance of parties to his appeal to the Supreme Court of the United States, granted on the 25th day of April, 1874, in said cause, said ap-

pellant moves to sever, from said appeal prosecuted by said appellant, John B. Manning, State of Alabama, Edward Eikleheimer, Alexander Woods, Thomas K. Ferguson, Nathaniel Lane, B. Edwards Grey,
339 John McNabb, William White & Co., J. H. Huber, J. C. Compton, and W. S. Mudd, because said parties to the bill have accepted in full the terms of the decree of June 11th, 1872, in said cause, and have been notified of said appeal, and failed to respond thereto, and are not in like interest with appellant in said cause; that E. G. Fowler, Wm. F. Hatchett, Wm. H. Graves, W. I. Bibb, S. W. House, J. C. Bonner, J. F. Terrill, J. D. Willett, E. Beebe & Co., J. C. Compton, W. H. Graves, and Watts & Troy, solicitors, have each had personal notice served of said motion and application for severance of parties to said appeal. Upon examination of the records in the cause by the court, and after hearing the evidence of notice given by said appellant to said co-plaintiffs in said cause, it is considered by the court that said appellant do have leave to sever said parties from his said appeal, and that his appeal do proceed on behalf of said Harvey Terry, John Hardy, interest assigned to Joseph S. Wright, J. H. Fitts & Co., Hiram R. Edwards, Brook W. Young, Irwin D. Houser, George P. White, H. M. Hyatt, W. A. Ransom & Co., Adkin M. Mosely, R. S. Logan, Frank B. Bonifay, Napoleon B. Jones, Benjamin F. Noble, W. J. Robinson, and E. A. Powell;
340 and it is hereby ordered and directed that the clerk of this court do make up the record in the cause accordingly.

341 Circuit court of the United States for the fifth judicial circuit and southern district of Alabama.

I, Nathaniel W. Trimble, clerk of the circuit court aforesaid, do hereby certify the foregoing pages, from 1 to 340, inclusive, to contain a full, true, and correct transcript of the record and proceedings now on file in my office, at the city of Mobile, in a certain cause, wherein Harvey Terry is complainant and the Commercial Bank of Alabama is defendant.

In testimony whereof I hereunto subscribe my name and caused the seal of said circuit court to be affixed, this the 19th day of June, A. D. 1874.

[SEAL.]

N. W. TRIMBLE,
Clerk Cir. Ct. U. S., So. Dist. of Ala.

(Indorsement on cover:) No. 194. Harvey Terry, appellant, vs. The Commercial Bank of Alabama. S. Alabama C. C. U. S. Filed 27 June, 1874.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.—NO. 194.

———o———

Harvey Terry, Appellant,
vs.
The Commercial Bank of Alabama, Respondent.

———o———

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

HARVEY TERRY, *for Appellant.*

SUPREME COURT OF THE UNITED STATES.

———o———

Harvey Terry, Appellant,
vs.
The Commercial Bank of Alabama, Respondent.

———o———

OCTOBER TERM, 1875.—NO. 194.

———o———

BRIEF OF APPELLANT.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

The Appellant in this suit obtained a decree of judgment against the Respondent on the 11th day of June, 1872, in the District Court of the United States for the Middle District of Alabama, which said decree is hereby complained of and appealed from as hereinafter stated; and a petition and amended petition was filed in said cause, praying that said decree should be opened or annulled, and further proceedings had in the cause, which petition and the amended petition was denied, and the order denying said petition and amended petition is appealed from.

The Appellant in this suit filed his bill on the 26th day of October, 1871, in the District Court of the United States for the Middle District of Alabama, claiming payment upon $20,000 of the Bank notes of said Commercial Bank of Alabama, issued and put in circulation as money under the charter of said Bank, payable to the bearer on demand; and that Complainant acquired the said Bank notes for value, and had protested $3,093 of said Bank notes more than ten days before filing his said Bill in Equity, and claimed interest thereon from the date of demand and protest.

Said bill averred that said Commercial Bank of Alabama was duly created, organized, and operated under and by virtue of a certain Statute of the State of Alabama referred to, granting and conferring the chartered rights and privileges of said Bank, and imposing certain duties, obligations and requirements, to be performed by said Bank and the stockholders thereof. One of the requirements of said Statute by its 21st section was, that if at any time said Bank should issue Bank notes to circulate as money, and said Bank should become indebted and insolvent, then the persons and property of the stockholders should become liable to contribute to pay the debts of said Bank, and designated a bill in Equity as a proper legal proceeding to put said Bank in process of liquidation, and to assess upon each and every stockholder a *pro rata* sum of money sufficient to pay all of its debts

Said bill charged said Bank to have regularly issued, put in circulation and then outstanding and unpaid at that date $200,000 of its notes, and that said Bank was insolvent and unable to pay its debts, and said bill prayed that process and proceedings might be had in said Court sitting in Equity, as said case may require, as shall result in a full distribution of all of the assets of said Bank according to the rights of all parties, as provided by the 21st section of said charter hereinbefore referred to, to wit: herewith set out:

SECTION 21. *Be it further enacted*, That in case the said Bank be found insolvent, and settlement of its affairs be ordered as herein provided, the same shall be done upon bill filed in said Chancery Court, under the orders of the Court and rules of Chancery, and full distribution shall be made of the assets according to the rights of the parties; but the holders of Bank notes and obligations issued by the Bank for circulation as money, shall be first called in and paid, and shall have priority over debts due from the Bank; and after the assets of the Bank are exhausted, if they be not sufficient to pay all debts and liabilities, a further call shall be made on the share-holders in the Bank for a further payment of capital over and above the sum of one hundred dollars, of an amount equal to the deficiency, which shall be apportioned among all the shares of stock, as well of the individual stockholders as of the State, and an order shall be made by the Court for the payment of each share-holder of the sum or proportions due on his shares of stock; and each share-holder shall pay the sum so assessed to him severally in proportion to his stock, which shall be collected by the Receiver and applied; and in case the State hold stock in said Bank, it shall provide for and pay its proportion of this additional capital in proportion to the stock so held in said Bank to be applied in like manner."

Said Respondent filed its answer on the 9th day of December,

1871, in reply to said bill. admitting the organization of said Bank as charged in the bill; that said corporation issued its Bank notes as money, and had outstanding and unpaid at that date $191,400 of said Bank notes, and admitted the insolvency of said Bank, and admitted the presentation and demand for payment by the Notary as Complainants' agent of $3,093 of the Bank notes of said Commercial Bank, but denied that the certificate of said Notary Public was a legal protest, and denied that said Bank notes were legally protested; but admitted that the notes of said Bank held by the Complainant were unpaid, and demand for payment had been made.

That upon the hearing of said cause, J. C. Compton was appointed Receiver by consent of Solicitors of both the Appellant and Respondent, by decretal order of December 14, 1871, and directed to take charge of and administer upon the assets, estate, rights and effects of said Bank, under the direction of said Court in said cause; that said decretal order of December 14, 1871, contained a direction to the Master of said Court to summons and notify all creditors of said Bank, by advertisement once a week for eight successive weeks in one newspaper in the city of Montgomery, for said creditors to be and appear before him, and present and file their claims with the undersigned Clerk of said Court, on or before the fourth Monday in May next, or thereafter be forever barred.

That in pursuance of said limited notice given by the Master, creditors holding only about $47,000 of said Bank notes and other claims appeared filed and verified their claims in said cause, and one claim for $33, founded on said Bank notes, was rejected, as shown by the report of said Master, on the 29th day of May, 1872. That said Master in said report, passed upon and allowed the claims of Thomas K. Furguson, founded on a certificate of deposit, and admitted said claim as being of full dignity and entitled to share *pro rata* payment with said Bank notes proved.

That said Master in said report passed upon the claims of John B. Manning for $12,836 principal and $450.60 interest, and the claime of William S. Mudd for $2,166.79 principal and $79.47 interest, founded upon judgments against said Commercial Bank, the interest due on said judgments being allowed as of full dignity and entitled to share *pro rata* payment with Bank notes proved.

That in pursuance of a decretal order filed May 31st, 1872, said Master received, filed, passed upon and allowed a claim for $3,500 to Complainants' Solicitors in said cause, founded upon a claim for services rendered in filing said bill.

That in pursuance of the foregoing proceedings stated, a decree was entered on the 11th day of June, 1872, as follows: "This cause coming on to be further heard at this Term of Court, and having been submitted for final decree upon the pleadings, proof, and reports of Receiver and Master:

It is ordered, adjudged, and decreed by the Court that the report of the Master be in all things ratified and confirmed.

It is further ordered, adjudged and decreed, that J. C. Compton, Esq., the Receiver in this cause, pay over to the persons herein named, out of the cash in his hands, as such Receiver, the following amounts, viz:

1ST. To the Clerk of this Court, the sum of four hundred and eleven 18-100 dollars, ($411.18.)

2ND. To Elliott C. V. Blake, Esq., Master, the sum of three hundred and thirty-two dollars, ($332.)

3RD. To the Marshal of this Court, the sum of ten dollars, ($10.)

4TH. To the Complainant's Solicitors, the sum of thirty-five hundred dollars, in full compensation for all services by them rendered or to be rendered in this cause.

5TH. That the said J. C. Compton, Esq., retain out of the cash in his hands as aforesaid, the sum of one thousand one hundred and twenty-three ($1,123.78) dollars, as compensation for his services as said Receiver, in receiving and distributing the cash aforesaid.

It is further ordered, adjudged and decreed by the Court, that J. C. Compton, Esq., Receiver as aforesaid, pay over the balance of the cash in his hands, after paying the fees, costs and expenses of this suit, as hereinbefore mentioned, to the creditors of said Commercial Bank of Alabama, whose claims have been allowed by this Court, *pra rata*, according to the amount of such claims as allowed.

It is further ordered, adjudged and decreed by the Court, that the said J. C. Compton, Esq., Receiver as aforesaid, distribute the bonds, bills, notes and all other assets of said Bank, after deducting five per centum thereof for his compensation, *pro rata* amongst the creditors of said Commercial Bank of Alabama, whose claims have been allowed by this Court, in exact proportion to the value of said assets and the amount of each claim as reported by the Master and allowed.

It is further ordered, adjudged and decreed, that so much of the former order of this Court as conflicts with this decree, be and the same is hereby set aside and revoked.

It is further ordered, adjudged and decreed, that all creditors of and holders of the bills or notes issued by said Commercial Bank of Alabama, who have not presented their claims and had then allowed by this Court, be and they are hereby forever barred and foreclosed from prosecuting their claims against the said Commercial Bank of Alabama.

It is further ordered, adjudged and decreed, that the said Commercial Bank of Alabama, its officers and stockholders, be and they are hereby forever discharged from any and all liability for or on account of any debt or demand, of whatsoever nature, now or here-

tofore subsisting against the said Bank and officers or stockholders of the same.

JUNE 11, 1872.

RICHARD BUSTEED, Judge.

E. C. V. BLAKE, Clerk.

Filed June 11th, 1872.

N. W. TRIMBLE, Clerk.

Received and filed May 29, 1873.

That afterwards, on the 28th day of January, 1873, an order was taken in open Court, for the Receiver to sell $9,000 of the bonds of the city of Selma in his hands as the assets of said Commercial Bank; said order recites that said Receiver could not distribute said bonds to the creditors as heretofore directed to do; said order authorized the sale of said bonds at public or private sale, and by employment of brokers in New York or elsewhere to make sale of said bonds; but said bonds remain unsold and are unsaleable or worthless.

That on the 30th day of January, 1873, a petition was filed by the Appellant in the cause to open, amend or consider said decree of June 11th, 1872, a decree interlocutory only, and prayed for further proceedings in the cause; which petition and the proofs therewith filed being heard on the first day of February, 1873, said petition was denied.

That on the 11th day of February, 1873, leave was granted by the Court to the Appellant to file an amended petition, and to offer further proofs in the cause thereto, which said amended petition was filed on the 29th day of May, 1873.

That on the 23rd day of December, 1873, the Receiver filed his report therein, stating his inability to sell the remaining $9,000 of bonds in his hands as assets of said Bank, of which he was directed to make sale; and therein gave the names of claimants, who had heretofore accepted bonds, &c., in settlement of their claims proved and the amounts paid to each of said claimants, and the amount of bonds on hand, unsaleable and unsold, which amount was $8,678 59-100 (Record, page 37,) of the assets of said Commercial Bank.

That on the 23rd day of April, 1874, a final hearing was had on the said petition as amended and the proofs thereto, and the prayer of said petition was denied; therefore, an appeal was prayed for by Complainant, and said appeal was granted by the Circuit Court of the United States for the Southern District of Alabama, said cause having been removed (by Act of Congress) from the District Court of the Middle District of Alabama to the said Circuit Court of said Southern District of Alabama.

ASSIGNMENT OF ERROR.

1ST. Because the decree of June 11th, 1872, made in this cause as a final decree, does not conform to the prayer in the bill.

2ND. Because said decree failed to direct that the creditor holders of the Bank notes of said Commercial Bank of Alabama, should be first brought in and paid, in conformity to the 21st section of the charter of said Bank, and in conformity to the prayer in said bill.

3RD. Because said suit is based upon the Bank notes, issued by said Bank, which have a priority over other debts for payment in money, and said decree exhausts a large part of the cash fund in Court in the said cause, in the payment of claims not founded on the notes of the Bank as therein proved, and the interest paid on claims not based on Bank notes, and a claim paid to Solicitors for services, and not in like condition of other claimants; and said decree directs the distribution of all the bonds, bills, notes and assets of said Bank *pro rata* amongst the creditors of said Bank, in payment of the claims proved in said suit, which proceeding was not in accordance with the prayer in the bill.

4TH. Because said decree directed the payment of $3,500 in cash to Complainant's Solicitors, not parties to the bill, and directed said payment made before the claims of creditors, holders of Bank notes, were first brought in and paid, and before the objects of the suit as prayed for in the bill, had been accomplished.

5TH. Because said decree was made a final decree, before the Master in said cause was directed to find or had ascertained whether all of the property and assets of said Bank, had come into the hands of the Receiver in said cause, or whether all of the property and assets of said Bank had been administered on and reduced to cash. and before bringing in all of the claims of the creditors of said Bank, holders of said Bank notes, and directing that they be first called in and paid, and directing such further proceedings as was necessary to secure the payment of all creditors of said Bank.

6TH. Because said decree was made a final decree before ascertaining whether the fund in the hands of the Court would pay par upon the claims proved in said cause, before proceedings were had in said cause, to assess and collect the sum required to pay all the debts proved, in conformity to Sec. 21 of said Bank's charter and as prayed for in the bill.

7TH. Because the Court refused to allow interest and damages on the claim proved in said cause by the Complainant, and because the Court did allow interest on the claims of John B. Manning and W. S. Mudd as judgment creditors, and directed payment made to them *pro rata*, before the holders of Bank notes were first brought in and paid.

8TH. Because said decree is made a final decree, barring the rights of all parties to said bill, creditors of said Bank, from prosecuting said suit, or any other suit, against said Bank or stockholders; thus barring and defeating the rights of creditors of said Bank, parties to said bill, and also barring and defeating the rights of creditors of said Bank, not parties to said bill, to make proof of claims or prosecute any suit to collect moneys due from said Bank and stockholders to said creditors; and because said decree discharged said Bank and stockholders from any and all liability to pay any debt or demand of whatsoever nature, now or heretofore subsisting against said Bank, or stockholders of the same, without subjecting said debtors to make payment to said creditors.

9TH. Because the Circuit Judge erred in denying the petition of Complanant, filed on the 30th day of January, 1873, and erred in denying the amended petition and proofs thereto, filed April 22d, 1874.

STATEMENT OF FACTS.

I.

That said decree of July 11, 1872, is a consent decree, made without Complainant's authority or knowledge, by his said Solicitors consenting with the Solicitors of Respondent, which decree thereby consented to, had the effect of a fraud upon the rights of said Complainant and other creditors of said Bank.

II.

That many creditors, holding Bank notes of said Bank to large smounts, do exist, who want to prove their claims in said cause; that said Bank and stockholders owe large sums of money to Complainant and other creditors, holding said Bank notes, who are barred by said decree, and that said decree does not conform to the prayer in the bill, and that both the Attorneys of Complainant and the Attorneys of Defendant knew these facts, before consenting to said decree as a final decree.

III.

That no account of the assets of said Bank was ever taken by the Master in said cause, to show that all of the assets of said Bank had come into the hands of the said Receiver, or to show that all of the assets of said Bank were administered on, and to show that said assets of said Bank would pay par upon the Bank notes and claims filed in said cause, and to show all and what deficiency existed in the payment of said Bank's notes proved, as required by 21st Section of said Act of incorporation and the prayer in the bill, and no accouut was taken to ascertain what further call or sum of

money was required to be assessed on the stockholders, to liquidate and pay the claims of the holders of Bank notes proved, before consenting to said decree as a final decree.

IV.

That the Appellants have received only part payment, to wit: 36½ per cent. of their claims proved, found due and decreed to be paid to said creditors; and the remaining assets of said Bank, in the hands of the Receiver and within the jurisdiction of said Court, in this cause, are unsaleable, worthless and of no value; and said Solicitors were bound to know these facts and the effect of said decree, before consenting to it as a final decree.

V.

That said Solicitors for Complainant refused to give their services to open or annul said decree of June 11, 1872, after they were duly informed of the error, mistake, or fraud made against their client, (the Complainant,) by the obtaining and enforcement of said decree; and that said Solicitors have refused to give their professional services to Complainant or other persons, to open or annul said decree, or to attempt to open or annul said decree, and have further proceedings in said cause as to conclude and determine the rights of all parties to the bill.

VI.

That the amount of stock held by stockholders in said Bank is five thousand shares, of the value of one hundred dollars each share, and that each share of stock so held was subject to assessment in said suit by process of said Court, of a sum of money sufficient, and apply the same, to the payment of the debts due by said Bank to the creditors thereof, as set out in Section 21 of said charter.

ARGUMENT OF FACTS.

1st. That the decree does not conform to the prayer in the bill. That the prayer in the bill is, "that such proceedings be had in said Court, as shall compel the settlement of all of the debts of said Bank, and that ultimately, said Bank being found insolvent, such further proceedings may be had in said Court, as shall result in a full distribution of the assets of said Bank, according to the rights of all parties, as provided by the 21st Section of said Act of Incorporation, hereinbefore referred to. Said Section 21 of charter of said Bank is set out in full in the statement of this case, and says: "Full distribution of the assets shall be made according to the rights of the parties, but the holders of the Bank notes and obligations issued by the Bank for circulation as money, shall be first called in and paid, and shall have priority over debts due from the

Bank; and after the assets of the Bank are exhausted, if they be not sufficient to pay all the debts and liabilities, a further call shall be made on the share-holders in the Bank, for a further payment of capital, over and above the sum of one hundred dollars, of an amount equal to the deficiency, which shall be apportioned among the shares of stock, by the Court, for the payment of each share-holder, of the sum or proportion due on his shares of stock; and each share-holder shall pay the sum so assessed to him severally in proportion to his stock, which shall be collected by the Receiver and applied."

This language is too plain to be mistaken. The 5th paragraph of the Complainant (set out on pages 7 and 8 of the printed Recerd) is clear and distinct, direct and specific. The Decree (set out on pages 28–9 of the Record) directs: 1st—The payment of the costs in the case; 2nd—The payment of the Master's fees; 3rd—To the Marshal $1; 4th—To Complainant's Solicitors $3,500; 5th—That the Receiver retains out of the cash $1,123, for distributing the cash; 6th—That the Receiver pay over the balance of the cash to the creditors of said Commercial Bank of Alabama, whose claims have been allowed by this Court, *pro rata*, according to the amount of such claim as allowed; 7th—That said Receiver distribute the bonds, bills, notes, and all other assets of said Bank, after deducting 5 per cent. thereof for his compensation, *pro rata* amongst the creditors of said Bank, whose claims have been allowed, in exact proportion to the value of said assets and the amount of each claim as reported by the Master and allowed; 8th—It is further ordered, adjudged and decreed, that so much of the former order of this Court as conflicts with this decree, be and the same is hereby set aside and revoked; 9th—It is further ordered, adjudged and decreed, that all creditors of and holders of the bills or notes issued by said Commercial Bank, who have not presented their claims and had them allowed by this Court, be and they are hereby forever barred and foreclosed from prosecuting their claims against the said Bank. 10th—It is further decreed, that the said Bank, its officers and stockholders, be and they are hereby forever discharged from any and all liability, for or on account of any debt or demand of whatsoever nature, now or heretofore subsisting against the said Bank and officers and stockholders of the same. Complainant admits that the 1st, 2d and 3d paragraphs of the said decree are proper disbursements made in the cause. Complainant submits that there is no prayer in the bill that Complainant's Solicitors should be paid $3,500, out of the funds in said cause, and that they be first called in and paid in full, in preference to creditors preferred by law, as is directed by the 4th paragraph of the said decree; and Complainant submits that said Solicitors had bargained and contracted before commencing said suit, for a certain and specific

sum of money, paid in cash as a retaining fee, and a further contingent specific sum of money, to wit: 15 per cent. upon the sum collected and realized for Complainant by the proceedings in the cause. This fact is shown by affidavit of D. S. Troy (Record, page 44, last clause,) and by the affidavit of W. H. Graves, Esq., (on page 50 of Record, first clause,) and Complainant submits that there is no law or rule in Equity, giving or granting to Solicitors in a suit, any payment for their services out of the fund realized in said cause, when said Solicitors had bargained and contracted and received payment from their client, in exact accordance with said contract made.

And Complainant submits the fact to be, that the fund from which said payment was directed to be made, is a trust fund specially set apart by law for the payment of a particular and specified class of creditors of said Bank, and that said creditors shall first be called in and paid.

That the 5th and 6th paragraphs are in accordance with the prayer in the bill; but the 7th paragraph of said decree is a new order of judicial proceedings by the Hon. Richard Busteed, Judge, and needs attention.

The fact of the distribution of the assets of an insolvent corporation by process brought into Court, in or of itself is not remarkable, but it is the circumstances under which the act is done that makes the transaction legal or void. In the present suit, it is shown that more than $190,000 of the (Bank notes alone) debts of said Bank existed at the date of suit, (see answer of Defendant on page 11, Section 4, Record,) and less than $50,000 of said debts were represented or proven in said suit at the date of making said decree; (see Master's report, Record, page 21;) leaving nearly $150,000 of (Bank note) debts due by said Bank, not represented in said cause, at the time and date of making said decree; and only two-fifths of the Appellants were represented by counsel in the said cause; and the $150,000 of debts not proven was not represented by any one of said creditors, at the time said decree was applied for; and Plaintiff submits the fact to be that the reason why a very large number of the creditors holding a very large amount of the Bank notes of said Bank were not represented, was the want of information, that said suit existed, or that said decree was to be applied for. (See affidavit of J. H. Phintzey, Record, page 67. B. F. Noble, page 58. J. S. Wright, page 59. Joel White, page 60. John King, page 61. E. H. Levy, page 62. J. Jordan, page 63. George P. Curry, page 64. David Mayer, page 66. Thos. P. Cain, page 67. Charles Shonberg, page 68. Thomas P. Branch, page 69. George Goldthwaite, page 71. Harvey Terry, page 72. D. S. Troy, Record, page 43, last clause. W. H. Graves, page 49, first clause.)

The Solicitors of Complainant did not have instructions to apply

for or consent to have have any decree passed or made in said cause, contrary to or different from the prayer of the bill, and any variation of said decree from the prayer in the bill was a violation of the trust reposed by Complainant in the hands of his said Solicitors. It is shown conclusively that the Appellants in this suit have received only 36½ per cent, on account of their several claims proved in said cause, (see report of Receiver, Dec. 23d, 1873, Record, page 38,) and all the remaining assets of said Bank in the hands of the Court for distribution, are $8,678 of the compromised bonds of the city of Selma, unsaleable and worthless, and the bills, notes and other assets of said Bank, by the said report of the Receiver, last quoted, appeared to be *non est;* whatever they were, or whatever they are, they do not appear in the report of the said Receiver. Certain it is that these Appellants have not received any part or share thereof, and that there yet remains 64 per cent. due and unpaid on the claims of said Appellants from the said Bank and stockholders; and that by the ninth paragraph of said decree, found on page 29 of Record, all creditors of and holders of the notes of said Bank, who have not presented their claims and had them allowed in said cause, were barred, without payment or remedy, by said decree, and the Appellants are barred, without payment or remedy of the 64 per cent. due upon their claims, proved in said cause, although the charter extends the franchises of said corporation to the year 1886, and said charter provides a trust fund of any required sum, sufficient to pay all the debts of said Bank; and the prayer in the bill is, that such proceeding may be had in said cause as shall compel the payment of all the debts of said Bank, and the fact is that a very large amount of the Bank notes of said Bank exist in the hands of creditors who desire to have said Bank notes proved in said cause and such proceedings had thereon as shall compel payment thereof, in conformity with Section 21 of said charter.

That by the tenth paragraph of said decree, the corporation and officers and stockholders were discharged from any and all liability for or on account of any debt or demand of whatsoever nature now or heretofore subsisting against said Bank, its officers and stockholders of the same. And at the time of applying for and obtaining said consent decree the, Solicitors both for the Plaintiff and Defendant knew that a very large amount of the Bank notes of said Bank were then outstanding and unpaid, (see Defendant's answer, Record, page 11, Sec. 4; letters of T. P. Branch and responses by said Commercial Bank, J. C. Compton, Acting Cashier, pages 69 and 70 of Record; see affidavit of D. S. Troy, Record, page 44;) that he (Troy) moved for and obtained said decree, and that after the Master's report came in, creditors holding bills of the Bank, applied by petition to come in and prove their claims;

said Troy opposed all of said creditors and defeated some of them, of which fact the Defendant had notice before consenting to said decree barring and destroying the vested rights of creditors, without payment and without process for collection and payment from the trust fund set apart by law and liable for the payment of the debts of said Bank, as prayed for in the bill.

That many creditors do exist who desire to become parties to said bill and share in the results of the suit. (See affidavit of Thos. P. Branch, Record, page 70. J. H. Phinizey, page 58. B. F. Noble, page 59. Joseph S. Wright, page 59. Joel White, page 60. John King, page 61. E. H. Levy, page 62. Junius Jordan, page 63. G. P. Curry, page 65. David Mayer, page 67. Thomas P. Cain, page 67. Charles Shonberg, page 68. T. P. Branch, page 69. George P. Goldthwaite, page 71. Harvey Terry, page 72. All of whom are holders of the Bank notes of said Bank, and some of whom are Appellants in this cause, and all of whom are barred by said decree;) and the Defendant had notice of the most of these last stated facts before consenting to said decree.

The Plaintiff furthermore submits that the Circuit Judge erred in denying the petitions and in denying the amended petition, with the proofs thereto submitted by Complainant, for the following reasons: Complainant wrote his said Solicitors that he would attend said Court at the the trial of said cause, (see Record, page 74, last clause,) and that Complainant did so attend Court, and brought from Richmond. Va., his remaining Bank notes, to be proven in said cause, (see Record, page 74-5, also affidavit of John V. Terry, Record, page 61,) and applied to said Solicitors to make the proof therein; but said Complainant was surprised, upon his appearance at Court, to find that a decree had already been taken, by consent of Solicitors both for the Complainant and Defendant, as charged and shown by replication to answer of W. H. Graves, (Record, pages 74-5;) and the fact that said decree was a consent decree, has been admitted both by the Solicitors of Complainant and Defendant; (see answer of Graves, Record, page 48; answer of Troy, page 43; answer of Pettus, Record, page 46;) and that Complainant immediately applied to his Solicitors to re-open or annul said consent decree; but that said Solicitors refused to give their services to their client in the cause for that purpose, and did thwart and oppose Complainant from opening or attempting to open said decree (see replication to answer of Graves, Record, pages 75-6,) until the adjournment of the Court for the term.

That the Complainant immediately followed up his objections to said decree by requiring a substitution from said Solicitors, (see Record, page 75,) and appearing and filing exceptions to the report of the Master in said cause, within thirty days from the date of filing thereof, (see Record, pages 29-30,) and at the first subsequent

sitting of said Court, Complainant filed his petition in said cause, which was denied. He then filed his amended petition by leave of the Court, with proofs thereto, which was heard and finally denied on the 23d day of April, 1874, whereupon Complainant appealed.

That by the action, advice and direction of said Solicitors, Complainant was prevented from filing his said petition at the same term of the Court that said decree was enrolled, (see Record, page 75, second clause,) while the Court was in session, and said Complainant was hindered and delayed until said session of the Court had closed for the term; and although the said Solicitors, parties to said consent decree, deny under oath that any purpose existed between the Complainant's Solicitors and the Defendant to defeat the objects and execution of said suit, and deny that any combination existed or that any fraud was done or intended to be done in applying for and obtaining said decree.

Complainant submits, where a point of law or fact is disputed, the facts produced and the law governing the case must prevail. Said decree was an unusual decree, and said decree differed from and was at variance with the prayer in the bill, and was so made without the instructions, knowledge or consent of the Complainant. Said Solicitors knew that Complainant intended to be present at the trial of said cause. Said Solicitors did speed the cause and hasten said decree, by consenting to and applying for said decree, without instructions so to do. Complainant was not benefitted by said action, and Complainant was not benefitted by the terms inserted in said decree, to wit: barring all creditors; and Complainant was not benefitted by allowing $3,500 paid to said Solicitors; and Complainant was not benefitted by barring all creditors of said Bank, not parties to his said bill.

And Complainant submits, that said Solicitors were benefitted by said decree to the extent of $3,500; that the Defendant was benefitted, and that his co-obligors were benefitted to more than one hundred thousand dollars.

That the Solicitors of Complainant and Solicitors of Defendant are champions of the law, are men who know the effect of the act they did, Complainant submits, that the whole record of the case shows, that the objeects of the bill as set out, are not attained, and cannot be obtained under said decree, to wit; the payment of all of the creditors of said Bank; and Complainant submits, that said suit was not prosecuted and conducted in accordance with Sec. 21 of the charter, and in conformity to the prayer in the bill. Complainant submits, that these facts plainly and conclusively contradict, controvert and disprove the alleged denial of the said Solicitors, that no combination of counsel, to defeat the objects of said suit, to wit: "The collection of all the assets of said Bank and the trust funds appropriated by law to secure the payment

of the debts of said Bank, existed or was intended to be made to defeat the final objects and ends of said suit. Complainant submits, that the Circuit Judge did not give due weight and effect to the evidence before him produced in the petition and the proofs therewith to him submitted.

That on the 11th day of June, 1872, the decree appealed from was obtained by consent of Solicitors, as hereinbefore set out; that by the terms of said decree the costs in the cause were to be first paid; Solicitors of Complainant were allowed $3,500 of the cash in the hands of the Court, for services rendered by said Solicitors in said cause; the Receiver was directed to be paid in kind and the balance of the assets in said cause was directed to be distributed in kind *pro rata* among the creditors of said Commercial Bank of Alabama, according to the amount of such claim as allowed. Said decree further set out, that all creditors and holders of the bills or notes issued by said Bank, who have not presented their claims and had them allowed, be and they are hereby forever barred. Said decree further set out, that said Bank, its officers and stockholders, be and they are hereby forever discharged from any and all liability, for or on account of any debt or demand now or heretofore subsisting against said Bank and officers, or stockholders of the same. Said decree was moved for and obtainee as aforesaid, in opposition to the instructions of Complainant, and not in accordance with the prayer in his bill. And by said decree the Appellants obtained only 36½ per cent. of their claims proved in said cause, (the remaining assets appropriated by said decree for their benefit being worthless,) and the Solicitors of Complainant have received all the money they contracted to charge Complainant for their services in said cause, and have received $3,500 out of and from the fund, the results of said suit, in addition to the fees paid them by Complainant, (see report of Receiver, pages 38-9 of Record;) and Complainant submits, that said Solicitors did set out with the intention of obtaining that sum, or some other sum of money out of said fund, to be realized in the said suit against the said Bank, (see affidavit of Graves, Record, pages 49-50: Troy, page 44, last clause,) over and above the sum contracted to be paid by Complainant to them. This fact, taken in connection that said decree was hastened and concluded, before Complainant appeared at Court to attend the trial, when notice of his attendance therein had been given, is a circumstance particularly referred to, and to which the attention of this Court is absolutely directed; and Complainant submits, that the object of said Solicitors in hastening said decree, was the fact that Complainant would not allow said decree to be applied for, if present in person.

The consideration received by the Defendant, in consenting to and applying for said decree, was the release from payment or suit

and the barring of claims due to the Complainant and other creditors and the public of more than $100,000. These facts show the interest of the Solicitors of the Complainant and the Defendant in obtaining said decree; but Solicitors for Complainant aver that they obtained said decree in the interest of Complainant; (see affidavit of Graves, last line on pages 48-9 of Record; affidavit of Troy, page 44;) but how Complainant was benefitted by said decree, or how it was intended that he should be benefitted, is not shown, except it was by defeating the filing and proof of claims of all other creditors of said Bank, not parties to said bill. Complainant submits ,that his said Solicitors did attempt to defeat the petition of creditors to to file their claims in the cause and did defeat some of them. Complainant submits this fact to be, there did exist at the time of obtaining said decree a fund set apart by law appropriated for the payment of all the debts of said Bank, and that the Solicitors, both for the Complainant and Defendant knew that fact, (see list of stockholders, pages 56-7 of Record, and Section 21 of charter,) and Complainant submits the fact to be that a fraud was committed upon every creditor of said Commercial Bank, thus barred by said decree, while a fund remained out of which payment could and ought to be collected by the process of said Court, before making said decree.

Solicitors for the Complainant say that said decree distributed assets of the value of 95 per cent. on the claims proved. Complainant submits that said statement is absolutely untrue, and submits that bonds of doubtful validity, unsaleable and of no value, are not money; that Complainant has received only 30½ per cent. in payment on account, and that the remaining bonds or assets of said Bank in the hands of said Receiver, are worthless, as proven by said Receiver's report, filed December 23rd, 1873, (page 37, Record.) This fact existed and was known to said Solicitors, that said bonds were of doubtful validity and of uncertain value, (see replication to Graves, Record, page 76, first part; also Compton, Receiver, page 80;) and Complainant was not benefitted by said decree, as alleged in the affidavit of said Graves, (Record, pages 48-9; Troy, page 44, second clause;) and Complainant submits, that he is personally damaged by said decree, upon more than $2,000 of his claim proved in the said cause, and that he is barred upon a large amount of said Bank notes held and owned (at the date of the obtaining of said decree) not proved in said suit; and Plaintiff submits, that the facts shown by the Record prove conclusively that Complainant was not benefitted by said decree, and that Benj. F. Noble, a party to said bill, omitted by mistake to prove $950 of the Bank notes of said Bank in said cause, and said Benjamin F. Noble is also barred by said decree, and Benjamin F. Noble was not benefitted by said decree, (see affidavit of B. F. Noble, Record, pages 58-9;) and

said co-Complainant was damaged by said decree; and these facts, prove that said decree was not made in the interest of Complainant and those creditors in like condition; and said Solicitors utterly failed to set out or set forth in what way Complainants were benefitted, or that it was expected that they should be benefittted by said decree, except it was by depriving other creditors of said Bank from sharing in the benefits of said decree, (see affidavit of Troy, Record, page 44;) and Complainant submits this fact, that said Solicitors did intend to defeat the rights of creditors, who failed to get notice to file and prove their claims in said cause, from the benefits of said decree, and did intend to bar, defeat and annul the rights of all creditors not parties to the bill, from collection and payment on the Bank notes of said Commercial Bank of Alabama, then remaining outstanding and unpaid. Complainant submits there is no prayer to be found in his bill for that purpose.

The immense labor of the Solicitors for Complainant in this cause consisted in filing the bill in suit, ordering process served, and consenting to such proceedings in the cause, as suited the Defendant; and the greatest labor and only oral argument made in Court, was made in the contest about fees before the Master, (see Record, page 77, last clause;) and the fact that said Solicitors set out with the intention of obtaining said fee, (as admitted by them,) beyond the price contracted with Complainant for said services; and the fact that said Solicitors refused to give their services to Complainant to open or annul said decree, after they were informed of this mistake or fraud made against him, should be construed strongly against them, (see letter requiring substitution, &c., Record, page 75;) and the fact that said Solicitors refnsed to give their professional services to other creditors of said Commercial Bank to open or annul said decree, (see affidavit of W. A. Branch, Record, page 73; see letter Watts & Troy to E. H. Pringle, pages 63-4; see letter by W. H. Graves to John H. James, page 64 of Record,) should be fully considered, whether the conduct of said Solicitors, as shown by the facts above stated, was in accordance with the custom and practice of the profession, and [redacted] their acts do contradict their words. Complainant submits, that said Solicitors, by obtaining said decree, and by the means used to obtain said decree, (see affidavit of T. B. Branch, Record, page 70, and W. A. Branch, Record, page 73,) did sacrifice his rights vested, and did sacrifice his remedies for collection upon more than $7,009 of the Bank notes of the said Commercial Bank of Alabama; and that these facts disprove the affidavits of said Solicitors, that said decree was obtained in the interest of and for the benefit of Complainant in the cause. Said Solicitors deny that they combined or united in a consent to obtain said decree for the purpose of defeating the objects of said suit, to wit: the collection of all the

assets, effects, collaterals or trust funds belonging to said Bank, or liable for the payment of its debts, or sufficient thereof to pay all of the debts of said corporation, (see answer of Troy, page 43; answer of Graves, page 48, second paragraph; answer of Pettus, page 46, first paragraph,) and compare said answers with the facts proved to have been done. The Defendant corporation admits owing creditors, or having notes outstanding unpaid at the date of suit, to amount of $191,000, which fact Solicitors of Complainant knew; and by said decree it was only proposed to pay about one-fourth part of that sum, (see Master's report, page 20,) and the remaining notes outstanding were barred by said decree. By the charter and organization of said Bank, (both the Solicitors of the Complainant and the Solicitors of the Defendant knew that,) the capital of said Bank consisted of $500,000; and that the stockholders of said Bank held shares therein to the amount of $500,000; and that the stockholders by said Bank's charter were made co-obligors with said corporation, to pay the Bank notes and obligations of said Bank, as is and by said 21st section of said charter set out. These facts being true, Complainant submits that the facts in the case flatly contradict the assertion of said Solicitors. The fact of the admiscion of attempting to defeat the petition and filing of claims of creditors, and succeeding in defeating of filing of some of said claims (see affidavit Troy, Record, page 43, last clause,) is a fact and circumstance too strong and plain to require argument before an enlightened tribunal. The fact that the motive existed, to do what the law says shall not be done, and that such act was attempted and partially succeeded, is acknowledged. According to the facts shown, the proceedings in said cause had not progressed to that stage when it was practicable to make a final decree, at the time said decree was applied for. That said Solicitors, by their own admissions in Court, knew of other creditors existing, beyond the fact of what appeared in the Defendant's answer; that knowing the fact that other creditors did exist, whose rights and remedies would be destroyed and barred, by obtaining said decree, said Solicitors were estopped from obtaining said decree not in conformity with the prayer in the bill, and their right to any consideration for their services in said cause out of the fund realized in said suit, was thereby wholly and fully concluded, if any such right to payment for said services out of said fund ever did exist. Another fact in this remarkable suit is developed. The President of said Commercial Bank of Alabama, N. R. H. Dawson, Esq., is a stockholder and owns eighty-two shares in said Bank; that said N. H. R. Dawson, Esq., is one of the firm of Messrs. Pettus & Dawson, Solicitors for said Defendant corporation; that J. C. Compton, the Receiver, was the last Cashier, and was the cashier or agent of said Bank at the date of the commencement of said suit, and that by said consent decree,

said N. H. R. Dawson was released from the payment of $8,200 (or such other sum of money as should have been assessed against him by further proceedings of said Court in said cause) as ought to have been found due; and said corporation and stockholders thereof was released from the payment of about $150,000 or such other sum of money as should have been proven (upon liberal and wide circulation of notice of suit in said cause) and found due therein, but which was barred by said decree. And said N. H. R. Dawson, as the President of said Bank and as the Solicitor of said corporation, was fully informed of all the circumstances, liabilities, and existence of many creditors of said Bank, in remote and different States and sections of country, as is shown to exist by affidavits of J. H. Phinizey, Record, page 57; B. F. Noble, page 58; J. S. Wright, page 59; Joel White, page 60; E. H. Levy, page 62; Junius Jordan, page 63; David Mayer, page 66; Thomas P. Cain, page 67; Charles Shonberg, page 68; Thomas P. Branch, page 69; George Goldthwaite, page 71; H. Terry, page 72; George P. Curry, page 64; and many other creditors of said Bank, not included in said petition; and said N. H. R. Dawson knew all such facts before consenting to obtain said decree, well knowing that said decree did not conform to the prayer in the bill of Complainant.

And Complainant submits, that the Circuit Judge erred in denying the petition, and in denying the amended petition, with the proofs thereto submitted by Complainant, notwithstanding the eighty eighth rule of practice in Equity; and Complainant hereby refers to his arguments and authorities, addressed to Hon. W. B. Woods, Circuit Judge, as shown on Record, page 81 to 91 inclusive.

ARGUMENTS OF LAW.

I.

The bill in this suit claimed payment on $20,000 of the Bank notes of the Commercial Bank of Alabama, part of which, to wit: $3,093, of said notes had been protested more than ten days before commencing this action, for the the benefit of Complainant and all other holders and owners of the notes of said Bank in like condition who may make themselves parties to this bill, and contribute to the expenses in this proceeding.

The prayer in the bill is, that such proceedings may be had in said Court, sitting in Equity, as shall compel the settlement of all of the debts of said Bank, and require its affairs to be wound up and settled, as shall result in a full distribution of the assets of said Bank, according to the rights of all parties, as provided by the 21st Section of said Act of incorporation, hereinbefore set out as a part of said bill in the statement in this case. The answer of the Defendant admits the presentation and demand for payment of said

$3,093 of said Bank notes by the Complainant, and also admits that said Bank notes were presented and demand for payment made by a Notary Public, as Complainant's agent; and that N. H. R. Dawson, Esq., the President of said Bank, refused to pay the same and refused to write across the back of said notes the word "Protested," with the day and date of such writing and sign the same, and that said notes were presented to J. C. Compton, the agent of said Bank, (there being no Cashier) and demand of payment made thereon, which was refused; and said Compton refused to write across the back of said notes the word "Protested," with the day and date of such writing and sign the same, and admitted that said Notary had duly certified and served notice of making said protest, (see Exhibit A to bill, Record, pages 8-9, and answer, page 11,) and admitted the Bank notes so presented, amounted to $3,093, and admitted that the Bank notes sued on by Complainant were outstanding and unpaid; but denied that said notes so presented were legally protested. And Defendant further admitted, that the notes of said Defendant then in circulation as money outstanding and unpaid, amounted to $191,411, and also admitted that said Bank was insolvent.

The bill and answer having been submitted to the Court, by consent of counsel, J. C. Compton, Esq., (late Cashier or agent of said Bank,) was appointed Receiver, and qualified and took charge of such property and assets of said Bank as came into his hands under said decree, dated December 14th, 1871; that in conformity to said decree, the Master of said Court did issue a summons for all creditors of the Commercial Bank of Alabama and those holding the notes and bills of said Bank, to present and file their claims with the undersigned, Clerk of said Court, before the first Monday in May next, 1872, and that all claims not presented and filed shall be forever barred. That said decree directed said Master to publish this summons once a week for eight successive weeks in one newspaper in the city of Montgomery. Said notice of summons was dated at Montgomery, March 6th, 1872. That in consequence of said summons, creditors of said Bank presented and filed claims amounting to about $46,000, and some creditors appeared by petition after the day named in said summons to file their claims, and some creditors were allowed to file their said claims, and some creditors were excluded, as being too late to file their claims or to have them allowed. That in consequence of the proceedings had in the cause, the decree complained of was obtained on the 11th day of June, 1872, said decree being set out in full in the statement of this case.

II.

Complainant submits, as a matter of law and as a rule in Equity,

that the proceedings in the cause should be in accordance with the facts and rights of the parties set out in the bill, and that the decree must follow and conform to the prayer in the bill; and Complainant submits the fact to be, that said decree complained of was not founded on proceedings such as to secure the rights of Complainant and other creditors, as set forthin the bill, and said decree does not conform to the prayer in the bill, because said decree gave to Complainant a right to have and receive payment upon $3,093 of the Bank notes of the Commercial Bank of Alabama, but said decree only provided for the payment of about $1,100 and barred the rights of Complainant to further prosecute his claim against the Defendant in the cause and against Defendant's co-obligers. and therefore said decree ought not to be a final decree, because the prayer in the bill invoked the process and further proceedings in said Court (not had) in the cause at the date of obtaining said decree.

18 *Howard*, 199, *Craighead vs. Wilson.*

20 *Wallace*, 520, *Pollard vs. Bailey.*

III.

The prayer in the bill sets out that said Bank being found insolvent proceedings may be had in said Court, sitting in Equity, as shall compel the settlement of all of the debts of said Bank, as shall result in a full distribution of the assets of said Bank, according to the rights of the parties, as provided by the 21st Section of the said charter, heretofore set out. That Section provides that the holders of Bank notes and obligations issued by the Bank for circulation as money shall be first called in and paid, and shall have priority over debts due from the Bank; and after the assets of the Bank are exhausted, if they be not sufficient to pay all debts and liabilities, a further call shall be made on the shareholders in the Bank for a further payment of capital of an amount equal to the deficiency. Complainant submits that the whole proceedings in the cause show that the aforesaid pre-requisites for founding and obtaining said final decree had not been performed or effected by the proceedings in this cause, at the date of making the said decree complained of. That it was clearly the duty of the Court to have resisted the obtaining and granting of a final decree at that date. The report of the Master showed claims of creditors filed to the amount of about $46,000, most of whom were preferred creditors in the cause, and the report of the Receiver, filed May 29th, 1872, showed only the sum of $21,140 in cash in the hands of said Court; from this small sum of cash was to be deducted Clerk's fees in the cause, Master's fees, Marshal's fees, Receiver's per centages, and an extraordinary allowance to Complainant's Solicitors; the whole amounting to more thon $5,000, leaving a balance of only about

$15,750 remaining in cash to satisfy the claims proved ant submits, that it was the duty of the Court to have the crediters, holders of notes, and to have directed that paid.

That it was the duty of the Court to have directed the Master to have made an examination of the property and assets of said Commercial Bank and ascertained whether all of the property and assets had come into the hands of said Receiver, which necessary pre-requisite was not done before date of making said decree. The Court should have directed that all the property, assets and effects of the Commercial Bank of Alabama be converted into cash and distribution thereof made in conformity to Section 21 of said charter, as prayed for in the bill. It was the duty of said Court to then have directed the ascertainment of what creditors remained unpaid and the amount of money necessary to liquidate and pay all of the claims proved in said cause. It was the duty of the Court to have given wide and extended notice of the rights of creditors to appear and file their claims in said cause, and notice should have corresponded with and been extended in proportion to the extent and wide-spread circulation of said Bank notes, for the information of the holders thereof, which necessary pre-requisites were not done. It was clearly the duty of the Court to then have made an assessment of a sum of money against each and every shareholder of said Bank *pro rata* upon the shares held, sufficient to liquidate and pay all the debts of said Commercial Bank proved in said cause, and Complainant submits, that before these necessary proceedings were had in the cause, the period had not arrived wherein said Court could have made and directed a just and intelligent decree final.

2 *Black*, 559, *Ogilvie vs. Knox Ins. Co.*
" " 457-8, *Trustees vs. Beers.*
9 *Wallace*, 175, *in the matters of Howard.* 184—5—6—7.
16 *Howard*, 82, *Forniquet vs, Perkins.*
20 *Wallace*, 520, *Pollard vs. Bailey.*
37 *Alabama*, 543, *Watts vs. Watts, legatees.* 548.
Storys Eq. ~~Pleading, 211, 220, §219, §183 (2d)~~ Com. Spruden
5 *Wheaton*, 424, *Cook vs. Fenn.* 426—7.
46 *Alabama*, 496, *Petty vs. Britt, et al.*

IV.

Complainant's suit was a demand for payment in money, the prayer in the bill is for payment in money, the law does not recognize a payment in any other commodity or thing. But said decree directs a large amount of assets of unknown and unascertained value to be distributed lo creditors in the cause in payment of their claims. And this payment must be understood by the decree as a payment in full, without regard to the fact whether said creditor witter

that the proceedings in the cause should be in accordance with the facts and rights of the parties set out in the bill, and that the decree must follow and conform to the prayer in the bill; and Complainant submits the fact to be, that said decree complained of was not founded on proceedings such as to secure the rights of Complainant and other creditors, as set forthin the bill, and said decree does not conform to the prayer in the bill, because said decree gave to Complainant a right to have and receive payment upon $3,093 of the Bank notes of the Commercial Bank of Alabama, but said decree only provided for the payment of about $1,100 and barred the rights of Complainant to further prosecute his claim against the Defendant in the cause and against Defendant's co-obligers. and therefore said decree ought not to be a final decree, because the prayer in the bill invoked the process and further proceedings in said Court (not had) in the cause at the date of obtaining said decree.

18 *Howard*, 199, *Craighead vs. Wilson.*

20 *Wallace*, 520, *Pollard vs. Bailey.*

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20 *Wallace*, 520, *Pollard vs. Bailey.*
37 *Alabama*, 543, *Watts vs. Watts, legatees.* 548.
Storys Eq. ~~Pleadings, 211, 289, §§218, 1328 (2d)~~ Jurisprudence S. 218.
5 *Wheaton*, 424, *Cook vs. Fenn.* 426—7.
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be over paid or under paid thereby, because said decree is final in its terms and bars said creditors from any and all further process of collection against the Defendant or its co-obligors; and said decree goes further; it not only seeks to bind the creditors of said Bank parties to said bill, but said decree seeks to bind all creditors of said Bank who are not parties to said bill. Defendant replies, that you came into Court and consented to said decree; that you are bound by said consent to take, receive and have such money, property and assets as was in the hands of the Court at the time of giving said consent as a payment in full of the claim proved; you have had your day in Court, and are bound thereby. Complainant submits, that his bill is not a suit for property or a division of property, but submits that his bill is a suit for the payment of money and the prayer in the bill is for a decree for the payment of money, and that the Solicitors consenting and applying for any other purpose than a decree for the payment of money for the debts proven in the cause, is without instructions or authority of Complainant, and such act as to bind or bar his rights thereby is void.

5th Ed. — *Adams' Equity, Am. Notes, page* 369, *and authorities therein cited.*
2 *Hare*, 60. 2 *Abbotts' Nat. Digest*, 559, *Sec.* 14.
3 *Mason*, 419-20, *Williams vs. Reed.*
6 *Wallace*, 157, *Savory vs. Sypher.*
7 *Georgia*, 144, *Cox vs. Sullivan.*
5 *Randolph*, 639, *Smock vs. Dade.*
41 *Alabama*, 103, *Chopman vs. Cowles.*
3 *Stewarts' Ala. Rep'ts*, 27, *Gullet vs. Lewis.*
4 *Dessaussure*, 49, *Tankerly vs. Anderson.*
Story Eq. Jur. 1, 222, Sharon Jurisprudence S. 218.
Sherman & Redfield on Negligence 270. § 230.

V.

That the Court erred in refusing to allow interest on $3,093 proved in said cause by Complainant, and by refusing to compute interest thereon at the rate of 12 per cent. from the 3rd day of June, 1871, until the 11th day of June, 1872. That by the 18th Section of said Bank's charter, found (Acts of Alabama, 1855-6, page 236,) as follows: "Be it further enacted, That whenever any bill or bills, notes, checks or other issue of said Bank are presented at the counter of the same for redemption. and the Bank shall refuse to redeem the same, either in gold or in silver, the Cashier shall write across the back of such bill or bills, checks or other issues, the word "Protested," with the day and date, and shall sign the same; and all such bills, notes, checks and other issues so protested, shall draw 12 per cent. interest from the date of protest until the same shall be redeemed." The fact of presentation and demand for payment of said notes both by the Complainant and the Notary as his agent, as admitted by the answer of the Defendant, and the Defendant's refu-

sal to write the word "Protested," and sign the same on the back of said notes, is also admitted, and is further proven by the certificate of the Notary, (shown on Record, pages 11 and 8-9;) and that said demand and protest are in accordance with the rules and custom of the business community, and that such presentation and demand is prescribed in said Act, giving said corporation existence. That demand alone without protest, was just cause for demanding interest on said Bank bills at 12 per cent. per annum from the date of demand. 2 Wallace 440 · R. R Co vs Souther.

Sec. 18, *Acts Alabama*, 1855-6, *page* 236.

1867, *Code Alabama*, 302, *Sec.* 1174.

10 *Nat. Bankruptcy*, 289. *In matter of Assignee.* 293-4.

24 *Illinois Reports, page* 433.—*Reaper's Bank vs. Willard.*

VI.

That John B. Manning and W. S. Mudd, judgment creditors, from Circuit Couct of Dallas County, Alabama, were not the holders of Bank notes, nor the owners of Bank notes, in the legal terms and meaning of the charter of said Bank. That no prayer in the bill is found for the payment of judgment creditors *pro rata* with the holders of Bank notes; the prayer in the bill is that holders of the Bank notes of said Bank, be first called in and paid; and of right said John B. Manning and said Wm. S. Mudd should have been postponed and their payment of claims delayed until after the holders of notes had been first brought in and paid, the statute of charter being conclusive of their rights, upon this statement of facts. And Complainant submits, that the ultimate liability of said stockholders to pay the debts of said Bank is a trust fund set apart by law to secure the payment of all of the debts of said Bank which had lost their distinctive character as Bank notes; and Complainant submits the fact to be, that those judgment creditors were not the holders of Bank notes in a legal sense, and were not entitled to share *pro rata* in said assets. Thos H Ferguson Certifs of Depos

Charter, Section 21, *set out in the statement of this case.*

24 Howard 355.—6.

VII.

The answer of the Defendant admits of an outstanding indebtedness of over $190,000, and the claims proved in said cause are less than one-fourth part of that sum, and the Defendant well knew at the time of applying for said consent decree, barring all creditors, that his outstanding indebtedness exceeded $140,000 beyond the amount proved in said cause. Defendant knew that the assets in the hands of the Court were entirely inadequate to pay the claims proved in said cause. The Defendant knew that many creditors existed, who would have proved their claims said suit, if they were informed of the fact and opportunity to do so. The Defendan t

knew that Branch, Sons & Co. held a large amount of the Bank notes of said Bank, (see affidavit of T. P. Branch, Record, pages 69-70,) and that said Branch (Wm. A. Branch, Record, page 73,) would gladly make proof of said claim in said cause, if informed of his rights to do so, which information Defendant did not give. That one of the Defendant's Solicitors was directly interested and pecuniarily bound under said charter to make payment of said debts proved in the cause, and to make payment of said debts outstanding and unpaid, at the date of applying for said decree, barring all creditors of said Bank from payment of their claims, and discharging said Bank and stockholders thereof from the liability of paying the sum of about $145,000, or such other sum as ought to have been found due by further proceedings, which ought to have been had in said cause. Complainant submits, that it is illegal, unjust and in opposition to the rules and practice of Courts in Equity, to allow any creditor to be barred of his rights, without consideration or payment, when it is within the jurisdiction and power of the Court to secure his rights and compel the payment of his claims. Beyond this fact remains, that said decree does not conform to the prayer in the bill, but does conflict and is in opposition to the prayer of the bill. And the Complainant was not benefitted by that feature being put in said decree; but the claimant and his co-appellants were damaged by that part of said decree, and Complainant has appealed from that part of said decree and insists that that part of said decree is a fraud upon his rights, and is a fraud upon all of the rights of the Appellants in this suit, while a fund or security remained, out of and from which payment of said claims could have been collected by further proceedings had in said cause.

Kerr on Fraud and Mistake, 163, 187-9.

~~16 Howard, 19, Dyer vs. Potter.~~

~~24 Howard, 252, Day vs. Washburn.~~

Bump on Fraudulent Conveyances, 77, *and authorities therein cited.*

12 Wheaton 198 Matlow vs Kinde

VIII.

Claimant's Solicitors, having contracted before the commencement of this suit to give their professional services to the Complainant in this cause, to prosecute said suit to its final termination, for a certain cash fee in hand paid and a further fee, contingent upon the collections made and realized in said suit for Complainants. Said Solicitors were estopped thereby from making any claim upon the fund realized in said cause, for their services in prosecuting said suit. That the $3,500 directed paid by said decree to said Solicitors, was a part of the money realized in said cause for the benefit of Complainant and other creditors; and said Solicitors could not and ought not to appropriate the results of their own services in said

collection, when they had contracted to give those results to their client. Beyond the obligation of contract, Courts of Equity do not favor the granting of fees to Solicitors out of a trust fund appropriated by law to secure a certain and specified class of creditors; and all the Solicitors applying for said decree knew these facts of law existing, and all said Solicitors knew that no part of Complainant's bill authorized any such payment, and said Solicitors were not made parties to the bill in the suit. 10. U S. Stat 161.

2 *Daniel Chan. Pleadings*, 1434, *Sec.* 4, 1435-7, *in a creditor's bill, &c.*

3 *Sherman & Redfield on Negligence*, 2[illegible], §224-2[illegible], §230.

15 Wallace 452-3. Flanders vs Tweed.
Kerr on Fraud & Mistake IX 163.

That decree of June 11th, 1872, is a badge of fraud on its face, as in and by it proclaimed to be a final decree, determining the rights of parties complainant to relief, and awarding payment of costs in the cause, and directing certain other payments in cash, and directing the distribution of all the assets of said Commercial Bank to be distributed *pro rata:* among said creditors, without ascertaining what part of the claims of said creditors would be paid therewith, or whether the claims of said creditors proved in the cause would be over paid, at the same time barring and concluding the rights of all parties to the bill from further prosecuting their suit and from further payment upon their claims so proved and found due. That the Solicitors of both Complainant and Defendant knew that said decree, by its terms, barred the rights of creditors of said Commercial Bank from payment of more than $140,000, and said Solicitors all well knew that a trust fund existed provided by law, to secure all of these claims so barred by said decree, (see Section 21 of charter, answer of Defendant, Record, page 11, Section 4; Bump on Fraudulent Conveyances, pages 76-7; Kerr on Fraud and Mistake, pages 293-4; see affidavit B. F. Noble, Record, 58; affidavit H. Terry, Record, pages 41-2; affidavit W. A. Branch, Record, page 73;) Complainant submits that these facts existed as herein charged against said Solicitors; and that being so, the motives that moved said Solicitors to consent to and apply for said decree, as the facts have already appeared, was that Solicitors for Complainant received $3,500 out of the cash fund in Court, by the operation of said decree, and after obtaining said decree, said Solicitors refuse their services to Complainant to open, alter or annul said decree, although Complainant is barred from the payment of more than $7,000 of claims by the effect of said decree, of which fact said Solicitors had full notice before refusing their services to their client to correct the fraud or mistake made against him by their said act; (see letter requiring substitution, Record, page 75; see affidavit H. Terry, Record, page 72; see letter Watts

& Troy to E. H. Pringle, page 63-4, Record; also letter of Graves, page 64.) And said Solicitors for Complainant not only refused their services to Complainant, but refused other creditors to be employed to open or annul said decree. It is true that said Solicitors both of Complainant and Defendant deny any combination or intention to defeat the objects of said suit, but Complainant submits that on his argument of facts of the case, the acts of said Solicitors fairly, flatly and conclusively contradict and disprove the alleged denial of said Solicitors; the act being done, the facts appear fully and conclusively that the Plaintiff is barred of the payment of claims to more than $7,000. That B. F. Noble, a co-Complainant, is barred from receiving payment on $950 of claims; that numerous other creditore are barred of various sums of money; that the aggregate amount of claims barred is over $140,000. That Complainant's Solicitors are men of great intelligence and know the effect of their acts; that the presumption of law is against them; the law presumes they knew what they were doing, their subsequent acts confirm that they intended to do, and confirm what was done; their own admissions show their refusal to repair or correct the fraud or mistake made against their client, and their assertion of their right to payment for services rendered in the cause, out of the fund realized in the cause, gives the motive or reason for refusal to open or annul said decree; (see answer of Troy, Record, page 43; answer of Graves, page 48.) Said answers disclose the intention of said Solicitors to obtain a fee from the fund realized in said cause before they had commenced said suit. And the presumption of law should be construed strongly against all their acts, not clearly and effectively explained. The interests of Defendant in obtaining said consent decree, are far greater than the interests of Complainant's Solicitors. The Defendant corporation is absolved and released from payment by said decree of a vast sum of money, to wit: over $140,900. And the Defendant's Solicitor, N. H. Dawson, Esq., as a stockholder, holding 82 shares, is released from payment of the sum of $8,200, or such other sum of money as ought to have been assessed and found due against him, by process of the Court in said cause, before applying for and obtaining said consent decree; (Adams Equity, pages [redacted] 852. 776. 742. 2 Abbot's Nat. Digest, 559, §14, 189-191; Wheeler's Equity, page 452, §6, page 455. Sec. 40, 44, 45; Kerr on Fraud and Mistake, pages 162-171-172-182-3-214-293; 2 Daniel's Chancery Pleadings, pages 1434-7; 2 Daniel's Chancery Pleadings, 1501-2; Solicitors not allowed professionial charges from the fund in a creditor's suit. 10. U.S. Stat.

9 *Wallace*, 364, *Jones vs. Bolles.* 369.

15 *Peters*, 287, *Young et al. ve. Smith et al.*

6 *Howard*, 209, *Pulliam vs. Christian.*

~~2 Wallace, 449, B. B. Co. vs. Soulton.~~

19 *Howard*, 285, *Bebse vs. Russel.*
See list of stockholders, Record, page 56.

X.

The Complainant's petition, filed in the cause on the 30th day of January, 1873, with the proofs thereto, ought to have been granted and the amended petition, with the proofs thereto, filed on the 22d day of April, 1874, ought to have been granted, because the proofs therein show that Complainant and his co-Appellants were granted relief in his said bill to the amount of their claims actually proved in the cause; but said decree failed to provide a full and complete remedy for the payment of the claims of the Complainant. That it is shown in said petition, that Appellants have received only 36½ per cent. on their claims proved in said cause; and the remaining assets in the hands of the Court for the benefit of said Appellants, are therein shown to be worthless; and while said decree gives a right to payment of the whole claim proved, said decree only provides a relief for 36½ per cent. thereof, while a trust fund remained liable for and subject to the payment of all the debts proved in the cause; and the prayer in the bill invoked the process of said Court to administer upon and apply said trust fund to the payment of said claims; that said fund yet remains uncollected and unapplied to the payment of said claims, and 64 per cent. of said claims remained due and unpaid at the date of filing said, and no acconnt of the property and assets of the Commercial Bank of Alabama was made or taken by the Master before making the decree of June 11th, 1872, as a decree final therein, and thereby barring the rights of all creditors of said Commercial Bank from further process or proceedings in said cause, to enforce the collection and payment of the said claims proved; and said decree discharged the Defendants in the suit and its co-obligors, from all liability to pay any part of the said claims proved, without subjecting said Defendant and its co-obligors to the process of said Court to compel the payment of said claims. That said petition sets out and maintains that said decree is a fraudulent decree or has the effect of a fraud upon the rights of the Appellants in this suit, because said decree grants a right, and the prayer of the bill invokes the process of the Court for a full remedy within the power of the Court to exeeute; and said decree grants only a partial relief and bars and forecloses all further process of Court against said Defendant and its co-obligors, to complete the remedy that shauld have been decreed to the Appellants in this cause. That where a right is destroyed withont payment, when a remedy and fund existed set apart by law for the payment of said debt, the law presumes said act to be a fraud upon the claimant; and the Appellants submit, that the Circuit Judge erred in denying the petition of Complainant, although Complainant had the right of

appeal to this Honorable Court for redress from the decree complained of. And the Appellants submit the petition, proofs thereto, the arguments made and the authorities cited, found in the Record of this cause on pages 81 to 91 inclusive. And Complainant submits, that his right of appeal to this Hononorable Supreme Court of the United States, accrued when his petition was denied in said Circuit Court; and Appellants hereby refer this whole cause to the wisdom and equitable legal determination of this Honorable Supreme Court, as they shall find and construe it, and that these Appellants may be decreed such costs and allowance for their labor and expenses in prosecuting this appeal as shall appertain to justice and equity.

HARVEY TERRY,
For himself and others, Appellant.

Copy sent by Clerk to Defendants Solicitors by mail March 22. 1876.